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BRANDING IDENTITY

KATE SABLOSKY ELENGOLD[†]

ABSTRACT

The Civil Rights Act of 1964 protects against discrimination on the basis of race, color, religion, sex, or national origin—the so-called “protected classes.” To make out a successful civil rights claim under the current legal structure, a plaintiff must first identify the protected class under which her claim arises (i.e., race or religion). She must then identify a subclass of that protected class (i.e., African American race or Christian religion) and assert that, due to her membership in or relationship to that subclass, she was treated differently in violation of the law. This Article explores the disconnect between self-identity and perceived identity in the context of assigning membership in protected classes and subclasses. Specifically, it analyzes the tension inherent in the protected class deemed “color.”

By tracing the relevant legislative history of the Civil Rights Act of 1964 and the jurisprudence that has developed in the wake of its passage, this Article provides critical historical context for how identity has been assigned in civil rights jurisprudence. It finds that the institutional actors—the legislature and the courts—abdicated their responsibility to define the color protected class, differentiate color from race, and give clarity to the relevant subclasses of a color discrimination claim. Recognizing that gap, parties to civil rights actions have stepped into the void. Most recently, parties have begun inserting the concept of “people of color,” a term adopted by a modern progressive social movement to build solidarity and power among non-White minorities, into civil rights challenges. Such a shift in the language of civil rights law brings to the forefront the tension between a plaintiff’s self-identification and the plaintiff’s perceived identity that forms the basis of the defendant’s discriminatory action.

This Article warns against adapting the people of color concept for civil rights litigation. It argues that the category people of color, un-

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doubtedly important to developing cultural and political capacity and power, should not be inserted into civil rights litigation. Because of the history of conflating the terms color and “colored,” joined with the difficulty in disentangling color from race, the existing legal structure for establishing civil rights claims leaves little room for reimagining identity. Inserting the people of color construct into civil rights challenges will undercut the potential of the law to provide broad protection against discrimination and runs counter to the goal of achieving racial equality.

TABLE OF CONTENTS

INTRODUCTION	2
I. “COLORED” VERSUS “COLOR” – CIVIL RIGHTS ACT OF 1964	6
A. “Colored” in 1960s America	7
B. <i>White Versus Black – A Binary Assessment of Race</i>	9
C. “Color” is Undefined in the Statute	12
II. “COLORISM” IN THE COURTS	16
A. <i>Barriers to Moving “Color” Beyond “Colored”</i>	17
B. <i>Color on a Spectrum</i>	21
C. <i>Conflating Race and Color Discrimination Claims</i>	23
III. DEFINING AND DELINEATING “PEOPLE OF COLOR”	26
A. <i>A Brief History of “People of Color”</i>	26
B. <i>The Language of Racial Categorization is Meaningful</i>	34
C. <i>Pleading “People of Color”</i>	39
IV. THE CLASH OF “PEOPLE OF COLOR” AND “COLOR”	43
A. <i>White is a Color</i>	43
B. <i>Problems of Proof</i>	45
C. <i>Measuring Progress</i>	47
D. <i>A Brief Cost-Benefit Analysis</i>	49
CONCLUSION	50

It is a peculiar sensation, this double-consciousness, this sense of always looking at one’s self through the eyes of others, of measuring one’s soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twoness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

—W.E.B. Du Bois¹

INTRODUCTION

On December 17, 2009, Judge Mary S. Scriven, federal district court judge in the United States District Court for the Middle District of

1. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 8 (1903).

Florida, looked down from the bench and asked counsel for the United States of America, “Am I black?”² Counsel responded, “To my naked eye, you are, Your Honor.”³ Judge Scriven’s question at the pretrial conference in *United States v. Fountain View Apartments*,⁴ a civil rights case involving allegations of race or color and familial status discrimination under the Fair Housing Act,⁵ illuminates the complicated nature of racial classification in law. The government’s motion to exclude testimony of Hispanic renters where the complaint alleged discrimination based on race (“African-American”) and color (“black”) prompted the court’s inquiry.⁶ Defense counsel asserted that defendants should be permitted to introduce testimony from Hispanic tenants because the complaint alleged housing discrimination on the basis of “race or color.” Defense counsel posited, “Everything we have researched indicates that the word color encompasses peoples of color today.”⁷ In other words, she read the assertion of color discrimination under the statute as an assertion of discrimination against people of color, a term commonly associated with non-White racial minorities in modern American society.⁸ Defense counsel continued, “It’s a crucial point in this case, because the complaint alleges race or color, and it’s very important. We have a large population of colored persons historically at Fountain View Apartments. It’s a big issue for us.”⁹ It was clear from context that defense counsel was arguing that,

2. Transcript of Pretrial Hearing at 46, *United States v. Fountain View Apartments, Inc.* (Fountain View), No. 6:08-cv-00891 (M.D. Fla. Dec. 17, 2014), ECF No. 115.

3. *Id.*

4. From February 2008 to June 2014, I was a trial attorney at the United States Department of Justice, Civil Rights Division, and acted as lead counsel for the United States in *United States v. Fountain View Apartments*. *United States v. Fountain View Apartments* was originally filed in the Middle District of Florida on June 4, 2008. Complaint and Demand for Jury Trial at 1, *Fountain View*, No. 6:08-cv-00891 (M.D. Fla. June 4, 2008). The First Amended Complaint was filed on August 11, 2009. First Amended Complaint and Demand for Jury Trial at 1, *Fountain View*, No. 6:08-cv-00891 (M.D. Fla. Aug. 11, 2009), ECF No. 87.

5. *Fountain View*, No. 6:08-cv-00891, 2009 WL 1905046, at *1 (M.D. Fla. July 1, 2009); see also Fair Housing Act, 42 U.S.C. § 3601–3631 (2012).

6. See First Amended Complaint, *supra* note 4, para. 26 (“From at least 2000 through the present, Defendant James Stevens has been subjecting actual and prospective tenants at Fountain View Apartments to discrimination on the basis of race or color. Such conduct has included, but is not limited to: a. Directing Fountain View employees to tell black or African-American prospective tenants that there are no available apartments, regardless of availability; b. Refusing to negotiate with black or African-American prospective tenants for rental; c. Misrepresenting the availability of units to black or African-American potential tenants; d. Threatening to evict one or more tenants who were known or believed to have black or African-American friends and associates; e. Making statements with respect to the rental of apartments at Fountain View Apartments indicating a preference, a limitation, or discrimination based on race or color; and f. Failing to offer black or African-American persons the same terms, conditions or privileges regularly offered to white persons.”).

7. Transcript of Pretrial Hearing, *supra* note 2, at 45.

8. See Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 962–63 (1995) (noting that the number of groups and subgroups included in the people of color construct has grown over time to include an increasing percentage of non-Blacks); see also Paulette M. Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53, 55 n.9 (1999) (“The term ‘people of color’ often refers not only to the possibility of progressive coalition among subordinated racial groups but also to the changing demographics of the population of the United States.”).

9. Transcript of Pretrial Hearing, *supra* note 2, at 46.

if the United States alleged color discrimination, then defendants could introduce evidence that they rented to some individuals considered people of color to rebut the allegation that they refused to rent to other individuals also considered people of color.¹⁰

In civil rights litigation, where discrimination prohibition is based on identified protected classes—race, color, religion, sex, or national origin¹¹—the plaintiff identifies the protected class under which her claim arises. In order to prevail, the plaintiff must show that she was treated differently because of her membership in a subclass of that protected class.¹² Defense counsel's assertions and Judge Scriven's response in *Fountain View Apartments* raise critical questions for civil rights advocates: As the demographics of the country become more diverse, can the subcategories that form the basis of a discrimination claim be reimagined? Who gets to set the boundaries of those subcategories? And who determines whether the plaintiff falls within or outside of those boundaries?¹³ Focusing specifically on the protected class identified as color, and by tracing the actors who have influenced its definition and the boundaries of its subclasses, this Article investigates those questions.¹⁴ It concludes that the category people of color, widely used in society and political advocacy, should not be defined as a subclass of color within the structure of the civil rights laws. Doing so runs the risk of swallowing the protections of the color class entirely. Even if the category survives, the substantive and evidentiary challenges raised by the insertion of the people of color construct will restrict development of

10. See *id.* at 43 (“I believe there is some question, even as to the claim, Your Honor. The complaint reads in terms of discrimination in terms of color or race which, in our mind, includes Hispanic population. Fountain View has traditionally had a significant Spanish population. For whatever reason, they have not had as many African-Americans there.”).

11. The Civil Rights Act of 1964 prohibits discrimination in certain public and private spheres on the basis of race, color, religion, sex, or national origin. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964). The Fair Housing Act prohibits discrimination on the basis of those protected classes, along with familial status and disability. Fair Housing Act §§ 804–05, 42 U.S.C. §§ 3604–05 (2012).

12. For example, an African American alleging a violation of Title VII of the Civil Rights Act of 1964 may allege that she was the victim of discrimination because she is African American, a particular bounded subclass of race. See 42 U.S.C. §§ 2000e-1 to -3. She alleges that she was treated differently because of her membership in the subclass (African American), not the protected class (race). Similarly, a woman alleging illegal sex discrimination in violation of the Fair Housing Act may allege that she faced discrimination because she is female, a particular bounded subclass of sex. See 42 U.S.C. §§ 3604–06.

13. There is another critical question related to this analysis—what happens when subclasses are not or cannot be bounded? In other words, what happens to civil rights legal protections when the assumptions about boundaries between subclasses cannot be logically maintained? Can the current civil rights statutory structure survive? Will it have any meaningful impact on addressing entrenched discrimination and bias? With the exception of a brief analysis of certain courts' discomfort with color discrimination as an unbounded concept, see *infra* Section II.B, this Article does not reach those important questions. For analysis of the broader critique and defense of the rights-based civil rights model see sources cited *infra* note 15.

14. The analysis in this Article primarily focuses on the period of time from the debates preceding the Civil Rights Act of 1964 to the present. It also focuses exclusively on the American experience with particular legislation and the interplay with racial labeling and categorization.

color jurisprudence, which is a critical step to realizing the full potential of the current civil rights statutes. This will undercut the potential of the law to provide broad protection against discrimination and runs counter to the goal of achieving racial equality.¹⁵

The legislature, courts, lawyers, plaintiffs, and defendants are all actors who have a role in asserting and defining protected classes, and the subcategories within those protected classes, that may form the basis of a discrimination claim. Part I of this Article tracks the legislative history of the Civil Rights Act of 1964 and the categories discussed and assigned therein. It highlights the tension between the language of racial classification (i.e., colored) employed at the time of the debates and the undefined protected class identified as color in the statute itself. It establishes that Congress refused to define the boundaries of the color protected class or explicitly identify a distinction between colored and color. Part II reasons that the legislature's inaction is a primary barrier to the courts' ability and willingness to (1) recognize colorism (discrimination on the basis of skin color),¹⁶ (2) define the color protected class, and (3) accept or assign plaintiff's membership in certain subcategories of that protected class.

Part III begins with a discussion of racial labeling over time, with a particular emphasis on the changing labels of Blacks in America. It introduces the difference between external categorization and self-definition, specifically looking at the recent trend of self-categorization as multi-racial, multi-ethnic, and multi-cultural, and the catchall term "person (or people) of color." Part III argues that, in the absence of definition from the legislature and the courts, other actors, including broader cultural forces, will attempt to define color and its boundaries in civil

15. There is much debate about the utility of the civil rights model as a force of social change and racial equality. *See, e.g.*, Caldwell, *supra* note 8, at 95–96 (arguing that the civil rights model is based on the experience of Whites, not Blacks, resulting in a structure that ignores the unique needs of a subordinated group such as social and economic justice and instead focuses on isolated legal rights); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363–64 (1984) (offering a four-tier critique on rights-based theory, which includes the ultimate argument that discourse about rights impedes progressive advances). *But see* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1356–58 (1988) (recognizing both the transformative power of anti-discrimination law and the dangers of the rights-based approach in legitimizing a structure that has traditionally subordinated Blacks); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 402–05 (1987) (challenging Critical Legal Studies scholarship in so much as it wholesale rejects rights-based theory, particularly as the critique is applied “to the black struggle for civil rights” (footnote omitted)). I find myself and this Article situated in the latter camp, recognizing both the limits of and the continued need for aggressive enforcement of the current anti-discrimination rights-based laws.

16. I borrow the definition of “colorism” from Trina Jones’s adaptation of Alice Walker’s definition as “the prejudicial treatment of individuals falling within the same racial group on the basis of skin color in the context of antidiscrimination law.” Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1489 (2000) (quoting ALICE WALKER, *If the Present Looks Like the Past, What Does the Future Look Like?*, in IN SEARCH OF OUR MOTHERS’ GARDENS 290, 290–91 (1983) (“Colorism—in my definition, prejudicial or preferential treatment of same-race people based solely on their color . . . [I]mpedes us.”)).

rights claims. It also recognizes the powerful impact of self-identification and agency in detailing one's narrative in the legal arena. Part III concludes by detailing the current trend of pleading discrimination or differential treatment in civil rights challenges where the complaint invokes the people of color classification. Finally, Part IV concludes the analysis by identifying the potential drawbacks of introducing the terms person of color and people of color into civil rights challenges. Ultimately, this Article argues that, despite the importance of agency in legal storytelling, the risk of importing the people of color concept into civil rights challenges outweighs the benefits.

Racial labels, whether externally defined or self-defined, have profound meaning to those labeling and being labeled.¹⁷ While carrying great meaning, however, labels are mutable and take on different significance depending on time, place, and speaker. Today, the people of color movement may operate to symbolize solidarity and build political and cultural coalitions among historically disenfranchised groups.¹⁸ Within the context of the current civil rights legal structure, however, application of the people of color construction will have the opposite effect. Insertion of the concept into civil rights jurisprudence may actually retract rights and inhibit movement toward racial equality.

I. "COLORED" VERSUS "COLOR" – CIVIL RIGHTS ACT OF 1964

This part provides an in-depth look at the legislative history of the Civil Rights Act of 1964, paying particular attention to the labels of racial categorization used therein and comparing those labels with the protections afforded to individuals based on color. Review of the legislative history provides three related insights. First, as seen in the debates preceding the Act's passage, the majority White legislature regularly invoked the term colored as a racial label affixed to African Americans,¹⁹

17. See *infra* Section III.B.

18. While use of the term people of color is regularly employed to foster coalition building among non-Whites in an effort to advance the interests of historically disenfranchised groups, its use in myriad circumstances also risks essentializing an enormously varied group of individuals and subgroups. See Caldwell, *supra* note 8, at 55 (citing Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997)) (recognizing that use of the term "people of color" risks "conceal[ing] overlapping and conflicting theoretical and practical issues"); see also discussion *infra* Section III.A.

19. It does not escape my attention that use of the term "African American" is a label itself, in its usage and in its construction (without a hyphen, in this case). Cf. Lorraine Bannai & Anne Enquist, *(Un)examined Assumptions and (Un)intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1, 14 n.49 (2003) (noting the recent trend toward omitting the hyphen for terms that combine races or nationalities); Grant H. Morris, *The Greatest Legal Movie of All Time: Proclaiming the Real Winner*, 47 SAN DIEGO L. REV. 533, 543 n.25 (2010) (explicitly choosing not to hyphenate African American because it may suggest that certain Americans are not as worthy as other Americans). The problem of choosing and constructing labels is replicated in this Article many times, with several different labels. For example, I struggled with whether to capitalize "Black" and "White." I decided to capitalize both terms, unless they appeared in a quotation. Cf. Wendy Brown-Scott, *Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?*,

the group identified by the lawmakers as the primary beneficiary of the legislation.²⁰ Second, at the time of passage of the Civil Rights Act of 1964, the legislators appeared generally to be operating with a foundational understanding that race is primarily defined as a binary distinction between Black and White. Therefore, even as some grappled with the possibility that race and color were different and that color did not mean colored, a kind of gravitational pull to remain in the binary structure persisted.²¹ Finally, the legislators explicitly refused to define the color protected class in the statute.²² That refusal has had a lasting impact on the analysis of civil rights protections today. It stands as an indicator that racial labels affixed externally define the protections of the Act and also leaves the courts with little authority to, or guidance on which to, define protections beyond traditional racial boundaries.

A. “Colored” in 1960s America

The legislative history of the Civil Rights Act of 1964 establishes, without doubt, that the lawmakers who drafted, amended, and argued about the landmark statute primarily used the terms “colored” and “Negro,” often interchangeably, to describe Black citizens, the group regularly identified by legislators as the primary beneficiary of the legislation.²³ The repeated use of the term colored as a racial label sets the stage for Congress’s refusal to define the color protected class, its boundaries, and the boundaries of the subcategories under which a color discrimination claim could arise. It also gives historical context for the current confusion in the courts about the relationship between color and race in civil rights litigation.

As early as 1962, Senator Kenneth Keating of New York, an advocate of a federal law banning literacy tests in voting, evidenced the acceptance and institutional use of colored as synonymous with Negro. Senator Keating quoted the Department of Justice’s assessment of the Fifteenth Amendment on the Senate floor: “[I]t forbids ‘onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race,’ and it vitiates measures which have the ‘inevitable

43 EMORY L.J. 1, 4 n.4 (1994) (noting her choice to capitalize “Black” even though certain reference guides advise the use of the lowercase because of her assessment of the “need for self-empowerment and self-definition”); Crenshaw, *supra* note 15, at 1332 n.2 (“When using ‘Black,’ I shall use an upper-case ‘B’ to reflect my view that Blacks, like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.”); Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637, 672 n.268 (2012) (“White and Black are capitalized in this Article in the same way as Latino and African American.”).

20. See, e.g., 110 CONG. REC. 6527–34 (1964) (Senator Humphrey’s explanation of the “affirmative case” for the civil rights legislation); *id.* at 6071–79 (Senator Long’s explanation of his opposition to the civil rights legislation).

21. See discussion *infra* Section I.B.

22. See discussion *infra* Section I.C.

23. See, e.g., 110 CONG. REC. 6527–33 (1964).

effect' of disenfranchising Negroes."²⁴ Keating and the Department's use of the terms "the colored race" and "Negroes" shows institutional acceptance that the terms could be used synonymously to identify a particular racial group in America. Georgia Senator Herman Talmadge, an opponent of the same legislation, discussed voter registration statistics from Georgia in the same way. He noted:

[A]ll of the 15 Georgia counties in which Negro registration amounts to 25 percent or more of the total number of voters are small rural counties. In one of them—the coastal county of Liberty—the Journal's tabulation showed 14 more colored persons registered than white. . . . And of the six Georgia counties in which no Negroes are registered, four of them in north Georgia, where few, if any, colored people reside.²⁵

Opponents of the civil rights bill regularly used the terms Negroes and colored to describe the same population. For example, in complaining about the request for a trade school for Blacks, Senator Russell Long of Louisiana noted, "The community did not have such a school for whites, but they asked to have one for Negroes, because the colored citizens did not have adequate facilities available to them."²⁶ And in one of the most loathsome exchanges in the legislative history, Senator Long and Senator Strom Thurmond of South Carolina affixed colored and Negro labels to the same population of people:

Mr. LONG of Louisiana. Would it not be fair to ask what kind of fix the colored folks would be in if they had not been brought to this country, but had been allowed to roam the jungles, with tigers chasing them, or being subjected to the other elements they would have to contend with, compared with the fine conditions they enjoy in America?

Mr. THURMOND. Of course, the Negroes are much better off as a result of their coming to this country.²⁷

Senators Long and Thurmond, employing colored and Negro in the most pejorative way, frame the civil rights legislation as inextricably linked with slavery. It is yet another demonstration that the term colored cannot be separated from the country's history of racial oppression of Blacks. And, therefore, it becomes more difficult to separate color discrimination from race discrimination. America's history of racial hierarchy, which has been woven into the fabric of our language over time, creates significant complexity when trying to separate color discrimination from race discrimination.

24. 108 CONG. REC. 7797 (1962) (quoting Department of Justice brief).

25. *Id.* at 7217.

26. 110 CONG. REC. 7605 (1964).

27. *Id.* at 7903.

As seen in the Keating quote, it was not just civil rights opponents who conflated the terms colored and Negro in the debates leading up to the passage of the Civil Rights Act of 1964. Senator Dodd, Democrat from Connecticut, for example, complained of segregation and exclusion in the craftsman economy.²⁸ He noted that “although there exist two Negro locals for cement mixers and bricklayers, most colored persons are employed only as unskilled laborers.”²⁹ And in support of Title VI of the legislation, Senator John Pastore of Rhode Island noted that two hospitals in North Carolina denied medical care “to those whose skin was colored.”³⁰ He went on to note that “[t]he Federal funds that helped to build these hospitals were raised, of course, by taxation—taxes paid by both white and Negro citizens. But the Negro in need of care could not get it at these hospitals simply because he was a Negro.”³¹

The pervasive use of the term colored to describe Blacks in the civil rights debates and the similarity of the term colored to one of the identified protected classes—color—is of particular import because it both exacerbated the association between color and race and quelled any movement to articulate legitimate differences between the two constructs. It ultimately operated to limit the emerging definition of the color protection. The legislators’ foundational approach to race as a binary distinction between White and Black offers a primary reason why.

B. White Versus Black – A Binary Assessment of Race

The debates preceding the passage of the Civil Rights Act of 1964 establish that the legislators’ primary approach to race was one of a singular distinction—White or Black. The binary approach to race is important in this analysis because it sets the stage for Congress’s failure to define the color protected class or explicitly distinguish it from race. That the color protection was so close to the term for Blacks—colored—further reinforced the singular division between Black and White, which became basic to the understanding of both the race and color categories in the legislation.

Certain opponents of the proposed legislation argued that the civil rights law would increase the distinction and difference between the two races—Black and White. In arguing that the legislation was unnecessary, South Carolina Senator Olin Johnston discussed proposed changes to voting laws: “Many States have a provision written into the qualifications for voters that if persons have been tried and convicted of certain crimes, they cannot vote. . . . That applies to white or colored citizens. There is no distinction between the two races in that respect.”³² Senator

28. 109 CONG. REC. 4155 (1963).

29. *Id.*

30. 110 CONG. REC. 7054.

31. *Id.*

32. 109 CONG. REC. 5101 (1963).

Russell Long of Louisiana used similar language in protesting legal integration measures by reasoning that forced integration would further increase tension between the two races. He questioned, "Do Senators realize how much legislation on this subject is already in our lawbooks? . . . More of it—especially the kind of it which was rammed through the House and which is now before us—will only drive the white and the colored races further apart"³³

Many supporters of the legislation shared the binary assessment of race in America. In affirming his support for Title VI of the legislation, Senator Philip Hart, Michigan Democrat, identified the legislation as one equalizing treatment of two races:

I share . . . the hope and belief that in the weeks immediately ahead the kind of record that is being made here today will enable us to consider the facts intelligently and respond to the several recommendations made in the President's civil rights message, particularly that section which aims at the use of funds for programs that are worthwhile. In my judgment, such programs will not be killed. Rather, the purpose is to have applicable in the administration of such programs rules which are consistent with the kind of nation we preach to the rest of the world that we are, a Nation that treats all its people with equal hand and equal justice, and does not have one window marked "white" and another window marked "colored," in order that taxpayers, white and colored alike, may participate in Federal programs.³⁴

Proponents and opponents of the legislation did *contemplate* beneficiaries of the legislation outside of the traditional Black/White binary. Senator Hubert Humphrey, Minnesota Democrat, specifically identified the fact that the legislators' first instinct was to restrain their analysis to traditional Black/White racial boundaries.³⁵ In trying to push against that impulse, he noted, "[C]itizens of America—not colored citizens—and, by the way, let us stop talking about colored citizens, and let us talk about citizens, because there are all shades of color."³⁶ Although less explicitly, in opposing the bill just before its passage, Senator Russell Long of Louisiana also gave a nod to the possibility that color might encompass an identity beyond Black and White.³⁷ In asserting that "tip-ping" is a natural by-product of integration, he noted,

[W]hen our liberal friends went about integrating the school system in Washington, they found that where 1 percent of the schoolchildren in a school were colored, no one tended to move out of the area, except perhaps one or two families. When the percentage reached 8 or 10 percent, the whites started moving out. By the time it reached 20

33. 109 CONG. REC. 5881 (1963).

34. *Id.* at 12,102.

35. 110 CONG. REC. 7799.

36. *Id.*

37. *See id.* at 7563.

percent, the whites were moving out even faster. Then when it reached about 70 or 80 percent, the great liberal integrationists moved out themselves. So eventually no one was left except one or two white children in an entire school. In an instance like that if one were to study the situation, he would probably find that some of those might have been Puerto Ricans, or might have come from areas where there is somewhat of a shade between the white and the colored races.³⁸

Even Senator Strom Thurmond, in opposing the legislation by touting his version of racial progress, gave lip service to the concept that color may be broader than colored. He noted:

I want to see the people of this country—white or Negro, or of any other color—have every advantage and every opportunity and all the rights to do well and make progress. I think we should be proud of what we have accomplished in the United States, and we should broadcast these facts to the world.³⁹

It is hard to ignore, however, the power of the foundational approach, the instinct that race is essentially defined as White versus Black, a singular and clear differentiation between two specific groups. In summing up his remarks in favor of the bill, Senator Warren Magnuson, Democrat from Washington, demonstrated that the legislation, at its core, was designed to equalize treatment of Blacks and Whites.⁴⁰ So, even when he explicitly invoked differential treatment on the basis of the color of one's skin, his starting point was a binary Black/White racial assessment:

Our assumption is that this is a nation of equals—yet this assumption falls to the ground as soon as discrimination to the Negro is taken into account.

...

The hard fact is that the American system of equality has, up to now, left out men and women whose skins were of another color.

...

38. *Id.*

39. *Id.* at 5802. Senator Thurmond's comment raises two related issues that should be kept in mind when assessing the usefulness of the language used by the lawmakers opposed to the civil rights legislation. First, each speaker presumably had an agenda and it is difficult, if not impossible, to separate the language used in a statement from the underlying agenda. That is not to say, however, that the language used isn't relevant to the inquiries this Article explores. Rather, as courts struggled to understand congressional intent, it is important to recognize how the lawmakers' agendas influenced the outcome. *See infra* Section IV.A. Second, Senator Thurmond's statement articulates that White may be deemed a subclass of color. The implications of that understanding and its effect on emerging color discrimination claims are discussed later in this Article. *Infra* Section IV.A.

40. *See* 110 CONG. REC. 7412.

The Federal judiciary has been forthright in upholding the proposition that race has no place in American life or law—that, in the lapidary phrase of the elder Justice Harlan, the American Constitution is colorblind.⁴¹

Congress's binary Black/White assessment of race sets the stage for the collapse of the color protection into race. It evidences a lack of vision on the part of the legislation's designers to imagine that there could be subcategories within the protected class that would deviate from traditional racial assessment. More specifically, it fails to imagine a scenario other than a Black complainant seeking recourse from a White defendant. When we place the language of the Civil Rights Act and its legislative history in the historical context of segregation and Jim Crow, it is understandable that legislators viewed the debate as a largely binary Black/White debate. A significant effect of that viewpoint, however, is Congress's resulting lack of urgency or foresight to define critical terms in the statute.

C. "Color" is Undefined in the Statute

Throughout the debates on the Civil Rights Act of 1964, Congress expressly and repeatedly refused to define certain critical words, including color. The legislative history shows that the choice to omit definitions was deliberate. Based on the data and reasoning set forth above, one may hypothesize that is because those same lawmakers did not or could not articulate the relationship between colored and color or race and color.

Opponents of the civil rights legislation specifically challenged the meaning of the term color during the many debates on the legislation. Senator John Little McClellan, Arkansas Democrat, and Texas Republican Senator John Tower discussed the lack of a definition for the term color:

Mr. McCLELLAN. What is "color" as defined by the bill?

Mr. TOWER. I am not sure I understand what is it.

Mr. McCLELLAN. The bill does not define it, does it?

Mr. TOWER. It is not defined. The term is ambiguous.⁴²

Senators McClellan and Tower purposefully draw attention to the bill's failure to define color in an effort to discredit the constitutionality and efficacy of the proposed legislation.⁴³ The legislators continue:

41. *Id.*

42. *Id.* at 7772.

43. *See id.*

Mr. McCLELLAN. Suppose that one of the six people to whom I referred should be one-tenth Negro. Under the statute would he be considered colored, or would he be considered more white than black, so that color would not enter into the question of his possible employment or rejection?

Mr. TOWER. That is a very interesting question. If he had a multinational background, and there were some sort of obligation imposed by the commission on the employer, to hire, say, a certain percentage of people with one particular ethnic background, and another percentage of people with another ethnic background, the question would be difficult enough for anybody to resolve, but it would be left to the arbitrary will and discretion of the commission.⁴⁴

The second part of the colloquy establishes that, although there was no explicit definition of color, Senators McClellan and Tower assumed that color was rooted in the term colored as they defined it synonymously with Black. And as the conversation continued, it became clear that the confusion was not limited to the relationship between color and colored, but that the confusion extended to other critical terms in the statute, such as race and national origin:

Mr. McCLELLAN. The pending bill does not undertake to define what is color and what is not color; does it?

Mr. TOWER. No; and we get into a real problem when we go into questions of color, religion, sex, or national origin. There can be all sorts of discussions along those lines.⁴⁵

The colloquy between Senators McClellan and Tower is interesting because it not only explicitly challenges the bill's failure to define the term color but also demonstrates the legislators' failure to disentangle racial labels (i.e., colored) from protected classes (i.e., color) and protected classes from one another (i.e., color as compared to race).

In debate the next day, Senator McClellan further demonstrated his inability to identify any meaningful differences between the terms color, colored, and Negro, even as he protested the bill's failure to define the term color:

The bill does not define what color is. What is color?

. . .

. . . The bill defines nothing. It leaves the situation in a hodgepodge.

What is a Negro?

44. *Id.*

45. *Id.*

If he is 55 percent white and 45 percent Negro, what is he, then, white or Negro, under this bill?

The bill contains no definition.⁴⁶

Proponents of the legislation never answered the call to define color.⁴⁷ Representatives Abernethy and Celler did, however, engage in a conversation acknowledging that certain intraracial discrimination could trigger protection under the color prong of related civil rights legislation:

Mr. ABERNETHY. I will ask another question. If it should be illegal—and I understand it would be under this bill—for an employer not to hire a person on the ground of race—that is, color—would it be illegal not to hire because of the shade of color, that is because the skin of the applicant is too dark?

Mr. CELLER. I suppose shade of color would be color. The whole embraces all its parts.

....

Mr. ABERNETHY. . . . Would the FEPC have authority to correct an employment discrimination among our Negro citizens in the District of Columbia, where light-skinned Negroes refuse to hire Negroes of dark skin?

Mr. CELLER. . . . I may say if there is any discrimination against the Negro regardless of his shade or gradation of pigmentation of his skin in employment, that discrimination would be a violation of this act.⁴⁸

Like the exchange between Senators McClellan and Tower above, the conversation between Representatives Abernethy and Celler shows that, even in the most expansive reading of color, the confusion between racial labels and protected categories persisted. The conversation highlights the difficulty legislators had both separating color from colored (or

46. *Id.* at 7875.

47. Congressman Dowdy of Texas offered several amendments to Title VII in February of 1964. One such amendment added certain definitions to the bill, including to “define ‘race’ to include the Caucasian race, and [] define ‘color’ to include white, and [] define ‘religion’ to include the word ‘Protestants’ and the phrase ‘national origin’ to include people born in the United States of America.” *Id.* at 2725. He explained:

From the discussions we have had on the floor here there seems to be some doubt that these things were covered. This last amendment would at least make the bill applicable to everybody. And if there is any protection in the bill for anybody, it would give everybody the same equal protection under the law, if there is any protection in the bill.

Id. at 2725–26. Although Representative Celler previously acknowledged that the bill banned discrimination against White people, the amendment was rejected. *Id.* at 2552, 2727.

48. See 110 CONG. REC. 2553–54 (discussing the Fair Employment Practices Act for the District of Columbia).

Negro) and distinguishing discrimination on the basis of race from discrimination on the basis of color.⁴⁹

Senator Gale McGee, Wyoming Democrat, a proponent of the civil rights legislation, recognized the importance of words and definitions but remained steadfast against pressure to include definitions for all such terms. He explained:

It is always a fascinating exercise to discuss what words mean. The meaning of words changes in each generation, in the course of time. . . . So long as we are dealing with human language, we shall have a disagreement about the meaning of words. . . .

I submit that so long as there are as many individuals interested in the specific semantics of the language as there are, we can never reach an absolute definition.

So, the choice is, Shall we do nothing, or shall we go too slowly and make certain that we do not make a mistake? Or shall we take a kind of step forward, with the kind of chance it represents, in order to produce timely action in the measure or tempo of our times?

. . .

A part of the colloquy on the floor of the Senate will make clear the general order of intent of Congress that will not be ignored downtown, even though we understand from time to time that there are, sometimes, misreadings of what a man meant when he said a certain thing.

But again, we must take chances. Therefore, I would hesitate to see us worry so much about the meanings of words and the absolute interpretations of where we go from here. I think it is important that we lay down some broad, general guidelines to move us another step toward the achievement of what we all agree is our dream of human rights.⁵⁰

Senator McGee's observations may represent the ultimate reasoning behind the decision to exclude definitions of color and related terms. He

49. Other proponents of civil rights legislation showed similar confusion. During the course of the debates for the Fair Employment Practices Act for the District of Columbia, Senator Thomas Dodd, Democrat from Connecticut, assumed that color discrimination is a problem of the "Negro population," noting,

I have been told that there are thousands of young people in this city who are no longer in school, but who cannot obtain employment largely because of their color. And I have been told time and again that the inability to obtain work is one of the main causes of delinquency and crime among young members of the Negro population of this city.

109 CONG. REC. 4154 (1963). And in discussing whether to bar literacy tests in elections, Senator Jacob Javits, liberal Republican from New York, similarly commented, "certain States have deprived thousands of Negroes of the right to vote on the ground of color, in violation of the 15th amendment." 108 CONG. REC. 7913 (1962).

50. 110 CONG. REC. 7794.

acknowledges that language is inherently ambiguous. Senator McGee, however, assumes that the broad guidelines laid out in the legislation will suffice to impart its meaning to future interpreters and adjudicators,⁵¹ which has not proven accurate.⁵² Senator McGee's sentiments are troubling in another way. The changing nature of words and labels may be "fascinating" in an academic sense, but the legislation was designed to provide specific legal protection to groups that had been historically disenfranchised and particularly vulnerable to bias and discrimination. As will be seen in the next part, the failure to define the categories of people who were afforded protection under the Act has had lasting consequences in the development of the jurisprudence. Failure on the part of the legislature to define color, to separate it from race and distinguish it from colored, left a vacuum that courts have been reluctant to fill. That vacancy has thus limited the protections embedded in the Act from being fully realized.

II. "COLORISM" IN THE COURTS

Congress failed to define color discrimination in the Civil Rights Act of 1964 and related statutes. The second most obvious actor to provide elucidation on the meaning of the statutory language, the judiciary, has offered minimal guidance and essentially no clarification.⁵³

The courts' approach to allegations of color discrimination is unsurprising for three primary reasons. First, when viewing language and racial categorization in the historical context of the Civil Rights Act of 1964, Congress offered little guidance to uniformly or consistently define color and color discrimination or apply legal tests for ferreting out such discrimination. Further, courts seemingly are similarly influenced by the impulse to view race as a Black/White binary. Without guidance from

51. He fails to see, however, that words contain both semantic and pragmatic meanings. Muneer Ahmad explains that the former is "the 'fixed context-free meaning' of words" and the latter is "the meaning that words assume in a particular context, as understood between particular individuals." Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1032 (2007) (quoting GUY COOK, DISCOURSE 29 (1989)). When it comes to defining the meaning of the term color as a protected class in civil rights legislation, both the semantic and pragmatic meanings of the word, as set forth in the legislative history, are elusive.

52. See *infra* Part II.

53. A basic tenet of statutory construction is that "courts should endeavor to give meaning to every word which Congress used and therefore should avoid an interpretation which renders an element of the language superfluous." *Rosenberg v. XM Ventures*, 274 F.3d 137, 141 (3d Cir. 2001) (citing *United States v. Alaska*, 521 U.S. 1 (1997); *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 550 (1996); *First Bank Nat'l Ass'n v. FDIC*, 79 F.3d 362, 367 (3d Cir. 1996)). So that is the first principle: every word should be given meaning. But what happens when the words used in statutes are undefined or ill-defined? At that point, courts, commentators, and advocates look to the legislative history to give meaning to the words of a statute. See, e.g., *Liparota v. United States*, 471 U.S. 419, 422-26 (1985) (assessing the plain language of the statute and then assessing congressional intent). And that is the second principle: legislators' discourse provides elucidation for statutory language. In the context of defining the meaning and boundaries of color discrimination and its related subcategories in civil rights legislation, those principles have been essentially unrealized.

the legislature, and starting from a narrow understanding of racial categorization, courts have made incongruous and sometimes baffling decisions with respect to defining and delineating color discrimination claims. Second, courts are uncomfortable categorizing and labeling people based on skin color, which runs along a spectrum and cannot be easily categorized,⁵⁴ an issue that will be more fully addressed later in this part. Third, the majority of litigants who plead color discrimination plead it as part and parcel of a race discrimination claim. It is unsurprising that courts fail to separate claims based on two protected classes—race and color—when litigants themselves generally conflate the concepts. Although overlapping issues that inform each other, this part addresses each in turn.

A. Barriers to Moving “Color” Beyond “Colored”

Courts, like the legislators who drafted the Civil Rights Act of 1964, have been stymied by a binary understanding of race. That binary assessment has influenced the judiciary’s willingness to grapple with differentiating color discrimination from race discrimination, determining how to assess color discrimination claims, and deciding who is responsible for drawing the relevant boundaries.⁵⁵ Because the civil rights laws rose from the vestiges of slavery and Jim Crow, it is challenging even now to move beyond that binary analysis.

When a court begins its analysis of race and color discrimination with an impulse to consider race and racial categorization under a Black/White binary analysis, it is difficult to see color discrimination separate and apart from race discrimination.⁵⁶ Through a Black/White

54. There is certainly a strong argument, however, that race is no more easily categorized than color. In the simplest analysis, there is almost no such thing as a pure race. Perhaps more complicated, but no less true, understanding that the concept of race is a social construct, it is difficult to suggest that race can be definitively ascribed or adopted. *See, e.g.*, Christopher A. Ford, *Administering Identity: The Determination of “Race” in Race-Conscious Law*, 82 CALIF. L. REV. 1231, 1283–85 (1994) (“The administration of our extensive corpus of anti-discrimination law and preferential policy requires that we make ‘hard’ variables of the very ‘soft’ concepts of race and ethnicity.”).

55. Trina Jones identifies a bias in American civil rights jurisprudence “towards thinking of discrimination in Black and White and cross-racial (as opposed to intra-racial) terms.” Trina Jones, *Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U. REV. L. & SOC. CHANGE 657, 677 (2010). Jones has also challenged courts and scholars to separate color discrimination from race discrimination. Jones, *supra* note 16, at 1532–34. While Jones acknowledges that race and color are overlapping phenomena, and that both concepts are social constructions, she makes a concrete distinction between race discrimination and color discrimination. She explains her views on the overlap in the concepts: “Skin color is one device for assigning people to a racial category. Race is the social meaning attributed to that category. It is a set of beliefs or assumptions about individuals falling within a particular racial group.” *Id.* at 1497. Jones goes on to distinguish colorism from racism: “With colorism, skin color does not serve as an indicator of race. Rather, it is the social meaning afforded skin color itself that results in differential treatment.” *Id.*

56. That color discrimination is separate and distinct from race discrimination, however, is not a conclusion accepted universally. Angela Harris argues that “race and color are not two different [concepts].” Angela P. Harris, Essay, *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 52, 61 (2008). Drawing on what she has defined as the “performativity school” of critical race theory, Harris identifies color as a trigger for

lens, it is also difficult to envision the circumstances under which a member of one racial category may discriminate on the basis of color—not race—against a member of a different racial category. It is unsurprising, therefore, that courts have primarily given credence to color discrimination claims when they are pleaded in circumstances of intragroup discrimination—discrimination against one who is a member of the perpetrator’s same racial group.

In *Walker v. Secretary of the Treasury, IRS*,⁵⁷ for example, the plaintiff alleged color discrimination under Title VII, specifically arguing that her supervisor, a dark-skinned Black woman, was prejudiced against light-skinned Blacks, a class into which plaintiff fell.⁵⁸ In *Walker*, the court rejected defendant’s suggestion that the terms race and color in Title VII are synonymous, pointing to “case law [that] repeatedly and distinctly refer to race and color.”⁵⁹ The court then drew the obvious conclusion:

This court is left with no choice but to conclude, when Congress and the Supreme Court refer to race and color in the same phrase, that “race” is to mean “race”, [sic] and “color” is to mean “color”. [sic] To hold otherwise would mean that Congress and the Supreme Court have either mistakenly or purposefully overlooked an obvious redundancy.⁶⁰

The *Walker* court also explicitly recognized the physiognomic differences between members of the same race, specifically Blacks:

It would take an ethnocentric and naive world view to suggest that we can divide caucasians into many sub-groups but some how [sic] all blacks are part of the same sub-group. There are sharp and distinctive contrasts amongst native black African peoples (sub-Saharan) both in color and in physical characteristics.⁶¹

Similarly, in *Jones v. Jefferson Parish*,⁶² the court declined to dismiss the plaintiff’s color discrimination claims under Title VII, noting that “[l]ight-skinned blacks sometimes discriminate against dark-skinned

racial discrimination. *Id.* at 61–62. She ultimately argues that “[t]he shift from categorical racism to colorism, if that is what the United States is currently experiencing, signals a more complex racial environment, but not a necessarily less racist one.” *Id.* at 62. Taunya Lovell Banks similarly identifies color discrimination as a form of race-based discrimination, which she labels “[r]ace-related discrimination.” Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1743 (2000) [hereinafter Banks, *Colorism*]; Taunya Lovell Banks, *Multilayered Racism: Courts’ Continued Resistance to Colorism Claims*, in SHADES OF DIFFERENCE: WHY SKIN COLOR MATTERS 213, 216 (Evelyn Nakano Glenn ed., 2009) [hereinafter Banks, *Multilayered*].

57. 713 F. Supp. 403 (N.D. Ga. 1989).

58. *Id.* at 404.

59. *Id.* at 406.

60. *Id.*; see also *Barrella v. Village of Freeport*, 43 F. Supp. 3d 136, 179 (E.D.N.Y. 2014).

61. *Walker*, 713 F. Supp. at 407–08.

62. No. 12-2191, 2013 WL 871539 (E.D. La. Mar. 8, 2013).

blacks, and vice versa, and either form of discrimination is literally color discrimination.”⁶³

Similarly, the most likely place to find a color discrimination complaint addressed by courts arises in cases involving a plaintiff of Puerto Rican descent.⁶⁴ In 1980, for example, the court in *Felix v. Marquez*⁶⁵ denied the defendant employer’s motion for summary judgment, recognizing that color discrimination was a legitimate claim under Title VII.⁶⁶ The court noted, “Color may be a rare claim, because color is usually mixed with or subordinated to claims of race discrimination, but considering the mixture of races and ancestral national origins in Puerto Rico, color may be the most practical claim to present.”⁶⁷

The district court in *Rodriguez v. Gattuso*,⁶⁸ a case arising under the Fair Housing Act, echoed *Felix*.⁶⁹ After a bench trial, the court found that the defendant landlords had been willing to rent an apartment to a light-skinned Latina woman until they saw her dark-skinned Latino husband. The court discussed color discrimination specifically:

Most often “race” and “color” discrimination are viewed as synonymous, just as the term “white citizens” is most often contrasted with “black citizens”—a racial distinction. But the very inclusion of “color” as a separate term in addition to “race” in Section 3604(b) implies strongly that someone who is of the same race (“race” as used in the

63. *Id.* at *5–7 (quoting *Williams v. Wendler*, 530 F.3d 584, 587 (7th Cir. 2008)); see also *Nettle v. Cent. Okla. Am. Indian Health Council, Inc.*, 334 F. App’x 914, 926 (10th Cir. 2009); *Rodriguez v. Gattuso*, 795 F. Supp. 860, 865 (N.D. Ill. 1992); *Rougeau v. La. Dep’t of Soc. Servs.*, No. 3:04-cv-00432-JJB-DLD, 2008 WL 818961, at *8 (M.D. La. Mar. 25, 2008).

64. *Banks, Multilayered*, *supra* note 56, at 217–18.

65. No. 78-2314, 1980 WL 242 (D.D.C. Sept. 11, 1980).

66. *Id.* at *1.

67. *Id.*; see also *Falero Santiago v. Stryker Corp.*, 10 F. Supp. 2d 93, 96 (D.P.R. 1998). In *Falero Santiago*, the plaintiff filed a Title VII action against his former employer for discrimination on the basis of national origin and color. *Id.* at 94. Pursuant to the *McDonnell Douglas* burden-shifting analysis, the defendant argued that the plaintiff failed to meet the “replaced” prong of the prima facie case because his duties were reassigned to another Puerto Rican. *Id.* at 96. The court pointed to the color discrimination claim, noting that “[t]he fact that Cabrera’s skin is of a different color places him outside Falero’s protected class, and is enough to satisfy the fourth element of plaintiff’s prima facie case.” *Id.* Citing to the Supreme Court’s reasoning in *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987), the *Falero Santiago* court noted that plaintiff’s case raised “allegations of intertwined national origin and color discrimination under Title VII, and given that Title VII explicitly affords protection against both national origin and color discrimination, the same reasoning [as the Court used in *Shaare Tefila*] would apply here.” *Falero Santiago*, 10 F. Supp. 2d at 97. Although the court found that the plaintiff was ultimately unable to establish that the defendant’s proffered reason for his dismissal was pretextual, *Falero Santiago* stands as one of the few cases that recognize both that color discrimination is actionable as an individual claim under Title VII and also that a color discrimination claim can stand alongside, without being subordinated to, a claim of discrimination based on another protected class (national origin). See *id.* at 98–99. The same analysis could easily be applied to “double discrimination” based both on race and color. The key issue to acknowledge is that color is not subordinated to race or national origin, but that a victim of discrimination on the basis of race and color faced adverse employment (or housing) actions both because of his color and because of his race. That is a distinctly different analysis from one in which courts treat race and color claims as one and the same.

68. 795 F. Supp. 860 (N.D. Ill. 1992).

69. *Id.* at 865.

ethnic sense, not the broader sense announced in *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 609-13 (1987) as the 19th century understanding of the term) but who is treated differently because of his dark skin has been discriminated against because of his *color*—something expressly forbidden by Section 3604(b).⁷⁰

Because of the impulse to think about race as a Black/White binary, the *Rodriguez* analysis has not translated to a broader array of color discrimination cases. In fact, in light of the current jurisprudence, there is a danger that recognition of color discrimination claims will adhere only to claims of intraracial discrimination or other circumstances in which traditional racial boundaries do not appear to apply.⁷¹ In *Rougeau v. Louisiana Department of Social Services*,⁷² for example, the plaintiff, a female of biracial heritage, alleged discrimination and retaliation on the bases of race, color, and gender.⁷³ While the court specifically recognized that “[t]here is no doubt that plaintiff, who is of bi-racial decent [sic], is a member of a protected class,” the court did not specify under which protected class it was analyzing Rougeau’s claims.⁷⁴ The majority of the opinion discusses “racially charged” questioning, “racial harassment,” and “racial discrimination,” suggesting that the court viewed Rougeau’s color claim as subsumed in her race claim.⁷⁵ The court only separated out the color claim in one specific instance. When discussing Rougeau’s disparate treatment allegations, the court discussed allegations against three of the plaintiff’s supervisors, two Caucasian and one African American.⁷⁶ The court assessed the former two under a race discrimination claim and noted, with respect to the African American supervisor, that “the likely basis for plaintiff’s discrimination claim against Ms. Booker is not racial discrimination, but rather color discrimination, which is recognized, albeit rarely, under Title VII.”⁷⁷

The *Rougeau* court’s approach may be a symptom of its urge to view racial categories narrowly drawn as White versus Black. Without a

70. *Id.* (parallel citations omitted).

71. That is not to say that intraracial discrimination cases are easy to win. Trina Jones identifies the challenges of proving intragroup discrimination, in part because the claims “do not fit the usual analytical framework for discrimination cases.” Jones, *supra* note 55, at 680. She defines types of intragroup discrimination claims, identifying particular barriers to those claims and articulating practical tactics plaintiffs can take to succeed in such claims. *Id.* at 677–80. Jones identifies specific challenges for plaintiffs alleging intraracial, intragroup discrimination, which she defines as vertical intragroup discrimination. *Id.* at 681–88. *Rougeau v. Louisiana Department of Social Services*, is an example of intraracial, intragroup discrimination—a Black supervisor discriminating against a lighter-skinned Black employee. *Rougeau v. La. Dep’t of Soc. Servs.*, No. 3:04-cv-00432-JJB-DLD, 2008 WL 818961, at *8 (M.D. La. Mar. 25, 2008). Jones argues that skepticism, indifference, and acceptance of such actions create barriers to successful vertical intragroup discrimination claims. Jones, *supra* note 55, at 687–88.

72. No. 3:04-cv-00432-JJB-DLD, 2008 WL 818961 (M.D. La. Mar. 25, 2008).

73. *See id.* at *1–2.

74. *Id.* at *6.

75. *Id.* at *6–8.

76. *See id.* at *7–8.

77. *Id.* at *8.

broader understanding of racial categories and racial identity, however, intraracial discrimination is difficult to assess under a traditional race discrimination analysis. Therefore, courts turn to the undefined, ambiguous concept of color discrimination to explain intraracial discrimination. The statute, however, does not delineate race discrimination and color discrimination in those narrow terms. The protection against race discrimination exists regardless of the perpetrator of the discrimination.⁷⁸ And the same is true of the protected class identified as color.

B. *Color on a Spectrum*

Courts and commentators have identified several impediments to successful claims involving color discrimination.⁷⁹ Perhaps the barriers are a symptom of the legislators' and courts' unwillingness to define and bound the protections against color discrimination, and perhaps they are the cause of that unwillingness. Whatever the reason, a major hurdle is a reluctance to label groups based on skin color, seemingly because skin color runs along a spectrum and cannot easily be categorized. Although all of the challenges and possible solutions to litigating a successful color discrimination case are beyond the scope of this Article, the discomfort with labeling and categorizing groups based on skin color is central to this Article's assessment of how color is defined, the subcategories that arise within the protected class, and who gets to define those categories.

The court in *Sere v. Board of Trustees of the University of Illinois*⁸⁰ explicitly identified the discomfort with categorizing individuals based on skin color. In dismissing plaintiff's intraracial discrimination claim under Section 1981, the court stated that it "refuse[d] to create a cause of action that would place it in the unsavory business of measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit."⁸¹ Although *Al-Khazraji v. Saint Francis College*⁸² overruled *Sere*'s reasoning with respect to intraracial discrimination,⁸³ it did nothing to change the underlying sentiment with respect to the difficulties in measuring skin color.

78. The *Rougeau* analysis also poses a problem in that it assumes that intragroup race discrimination may not be actionable. *See id.*

79. The problems of how to successfully litigate a color discrimination claim are beyond the scope of this Article. For a discussion about specific challenges litigants might face and practical advice for attorneys representing plaintiffs in intragroup discrimination cases, see Jones, *supra* note 55, at 662–63. For a discussion of the tests that might be employed in a color discrimination case and a proposed "race-plus" solution for color discrimination claims, see Enrique Schaefer, *Intragroup Discrimination in the Workplace: The Case for "Race Plus,"* 45 HARV. C.R.-C.L. L. REV. 57, 77–91 (2010).

80. 628 F. Supp. 1543 (N.D. Ill. 1986), *abrogation recognized by* Jordan v. Whelan Sec. of Ill., Inc., 30 F. Supp. 3d 746 (2014).

81. *Id.* at 1546.

82. 784 F.2d 505 (3rd Cir. 1986).

83. *Id.* at 517.

In fact, the court in *Moore v. Dolgencorp, Inc.*,⁸⁴ identified a similar discomfort. In *Moore*, a discrimination action arising under Title VII, the plaintiff, a dark-skinned African American woman, complained of race discrimination when she was replaced as a manager of a retail store by a biracial man.⁸⁵ The court, in assessing her race discrimination claim under the *McDonnell Douglas* framework, found that the plaintiff failed to establish the fourth prong of the analysis because the defendant replaced her with an individual who was a member of the same protected class (African American).⁸⁶ The plaintiff in *Moore* argued that her replacement was not a member of the same protected class because he was a “mixed race” male. She submitted affidavits in support of her claim, averring that she is “an African-American woman” whose “skin color is dark, even within the range of other African-Americans, and especially compared to persons of non-African-American heritage, including persons of mixed race.”⁸⁷ She further averred that she had seen the “mixed race individual who replaced [her]” and “[w]ithout question, his skin color is significantly lighter than [plaintiff]’s.”⁸⁸ The court in *Moore* refused to permit the plaintiff to convert her claims into color discrimination or sex discrimination claims and viewed the quoted averments as “a back-door attempt to amend the complaint to add claims of sex and color discrimination.”⁸⁹ The court ultimately concluded,

To recognize a legal hierarchy within the protected class of race based upon differences in the hues of skin color would create or deny legal remedies based upon sub-categories of this class that Congress has not chosen to recognize. It could also open the door to nearly insurmountable issues of proof in court regarding the actual racial heritage of a plaintiff and/or a person replacing a plaintiff, not to mention difficulties for everyone in the daily application of the Civil Rights Act.⁹⁰

84. No. 1:05-cv-107, 2006 WL 2701058 (W.D. Mich. Sept. 19, 2006).

85. *Id.* at *2.

86. *Id.* at *4. Under the test established in *McDonnell Douglas*, a plaintiff establishes his prima facie Title VII case by showing “(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.” *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Courts have found that the final prong may be satisfied by a showing that plaintiff “was replaced by a person not within the protected class.” *Falero Santiago v. Stryker Corp.*, 10 F. Supp. 2d 93, 95 (D.P.R. 1998) (citing *Mulero-Rodriguez v. Ponte, Inc.*, 98 F.3d 670, 673 (1st Cir. 1996)). Once the plaintiff establishes her prima facie case, the burden shifts to the defendant to establish that there was a valid and non-discriminatory reason for the adverse employment action. *McDonnell Douglas Corp.*, 411 U.S. at 802. If the defendant is successful, the burden shifts yet again back to the plaintiff to show that the stated reason is “mere pretext” for discrimination. *Id.* at 798.

87. *Moore*, 2006 WL 2701058, at *4.

88. *Id.* at *2.

89. *Id.* at *3.

90. *Id.* at *4; cf. *Franceschi v. Hyatt Corp.*, 782 F. Supp. 712, 723–24 (D.P.R. 1992) (acknowledging the difficulty of “distinguishing among a myriad of color shades, physiognomic and

The sentiments expressed in *Sere* and *Moore* may also have been at the heart of the Northern District of Illinois court's decision in *Oranika v. City of Chicago*.⁹¹ In *Oranika*, the court noted that the plaintiff's allegation of national origin discrimination on the basis of being Nigerian was reasonably related to a claim of race discrimination and color discrimination because "nothing in the Complaint suggests that the people of Nigeria are not of meaningfully uniform color and race."⁹² In fact, the court went on to note that "this at least may be a case where national origin, race, and color are all effectively the same thing."⁹³ Taunya Lovell Banks raises the question as to whether that same analysis would have been applied if the plaintiff was from a majority White country. Citing to a string of Title VII case law to illustrate courts' extreme reluctance to acknowledge color discrimination claims when the plaintiff is Black, she argues, "The colorism cases demonstrate the extent to which courts recognize, explicitly or implicitly, the fluidity of race when determining who is white and who is nonwhite, but not black."⁹⁴ The courts' reluctance to differentiate on the basis of color, especially within the Black race, circles back around to the central theme of this Article: Who sets the boundaries of the protected classes and the distinctions and differences that define the boundaries of their subcategories?

C. Conflating Race and Color Discrimination Claims

To date, the majority of courts treat allegations of color discrimination as synonymous with allegations of race discrimination. For example, in affirming the district court's grant of summary judgment to defendants, the Third Circuit in *Hartman v. Greenwich Walk Homeowners' Ass'n*⁹⁵ acknowledged that the plaintiff alleged discrimination on the basis of race or color. The court failed, however, to specifically address the two protected classes as separate claims of discrimination.⁹⁶ Courts around the country have proceeded in a similar manner, subsuming color discrimination into more widely pleaded claims such as race discrimination and national origin discrimination.⁹⁷ "The result, [as noted by at least

cultural characteristics" and dealing with that discomfort by finding that *Saint Francis*, for purposes of Section 1981, "recogni[z]ed that physiognomic characteristics are no longer considered the indispensable magic recipient for a cause of action under the statute"); *Walker v. Sec'y of Treasury, IRS*, 713 F. Supp. 403, 408 (N.D. Ga. 1989) (acknowledging explicitly the difficulty of categorizing individuals based on skin pigmentation, but ultimately concluding that the color discrimination claim should be put to the jury).

91. No. 1:04-cv-08113, 2005 WL 2663562 (N.D. Ill. Oct. 17, 2005).

92. *Id.* at *4.

93. *Id.* at *4 n.3.

94. Banks, *Colorism*, *supra* note 56, at 1738; see also Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1163 (1997).

95. 71 F. App'x 135 (3rd Cir. 2003).

96. *Id.* at 136.

97. See, e.g., *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 579–81 (1st Cir. 1999), *abrogated by* *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Porter v. Ill. Dep't of Children &*

one commentator,] is that ‘color’ is read out of the statute.”⁹⁸ It is tempting to blame that on the systemic issues identified above. It is also, without doubt, a response to the allegations set forth in the complaints and the resulting causes of action.⁹⁹

It is not unusual to find civil rights complaints that plead “race or color discrimination” as a single claim of discrimination.¹⁰⁰ The complaint (and amended complaint) in *Fountain View Apartments* did just that. With the exception of those paragraphs alleging discrimination on the basis of familial status, in each and every paragraph alleging discrimination, the complaint alleged discrimination “on the basis of race or color.”¹⁰¹ The complaint in *Sturm v. Davyln Investments, Inc.*¹⁰² provides yet another example. In *Sturm*, the complaint alleges violations of the Fair Housing Act¹⁰³ and other state and federal civil rights statutes.¹⁰⁴ In addition to asserting discrimination on the basis of disability, the *Sturm* complaint alleges race or color discrimination as a single cause of action.¹⁰⁵ The complaint specifically alleges: “Defendants . . . have engaged in discrimination and retaliation against Plaintiffs because of Plaintiffs’ disability or on account of Plaintiffs’ race and color (Black/African Americans)”¹⁰⁶ Like the complaint in *Fountain View Apartments*, the *Sturm* complaint separates the allegations of “race and color” discrimination from the allegations of discrimination on the basis of another protected class (in *Sturm*, disability).¹⁰⁷ In other words, the complaints in

Family Servs., No. 98-1152, 1998 WL 847099, at *1-4 (7th Cir. Nov. 23, 1998); *Love v. United Air Lines, Inc.*, No. 98-C-6100, 1999 U.S. Dist. LEXIS 4069, at *7-8 (N.D. Ill. Mar. 25, 1999).

98. Schaerer, *supra* note 79, at 81.

99. See, e.g., *Barrella v. Vill. of Freeport*, 43 F. Supp. 3d 136, 144 (E.D.N.Y. 2014) (noting the plaintiff’s allegations related to “race/color” and “race and/or color” and recognizing that both parties and courts regularly conflate the concepts of race discrimination and color discrimination (quoting Complaint at paras. 90-95, *Barrella*, 43 F. Supp. 3d 136 (E.D.N.Y. 2014))).

100. See, e.g., *Jones*, *supra* note 16, at 1533 n. 195, 1537-38 & nn.210-13; *Trina Jones, The Case for Legal Recognition of Colorism Claims*, in *SHADES OF DIFFERENCE: WHY SKIN COLOR MATTERS*, *supra* note 56, at 223, 229-32.

101. Complaint and Demand for Jury Trial, *supra* note 4, at 5-6.

102. No. 2:12-CV-07305, 2013 WL 8604662 (C.D. Cal. Sept. 30, 2013).

103. Although the Fair Housing Act was passed in 1968, four years after the Civil Rights Act of 1964, the Fair Housing Act (or Title VIII) has generally been considered an extension of Title VII in that Title VII’s jurisprudence and legislative history are generally considered to inform the meaning and import of Title VIII. See *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988), *aff’d in part sub nom. Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128, 158-60 (1976). Like the Civil Rights Act of 1964, one will find no definition of “color” or “race” in the Fair Housing Act. See Fair Housing Act § 802, 42 U.S.C. § 3602 (2012).

104. Complaint for Damages as a Result of Discriminatory Housing Practices Directed at Plaintiffs in Violation of Federal and State Fair Housing Laws at paras. 50-57, *Sturm*, No. CV 12-07305 (C.D. Cal. Aug. 24, 2012).

105. *Id.* at paras. 50-57.

106. *Id.* at para. 13.

107. See *id.* at para. 14 (asserting that the defendants discriminated in the terms, conditions, or privileges of rental of a dwelling “based on race and color, and disability” and that the defendants “evict[ed] tenants and those associated with the tenants because of the tenants’ disability, or race and color”).

Fountain View Apartments and *Sturm* exemplify the common practice of alleging “race or color discrimination” using a structure and citing factual allegations that fail to distinguish or give independent meaning to the color discrimination claim.¹⁰⁸

Litigants have pleaded race or color discrimination as a single cause of action even in cases where the evidence is solely differential treatment based on a Black/White binary, such as where match-pair testing of African Americans and Whites provides the basis for the allegations of discrimination.¹⁰⁹ Litigants have even pleaded “race or color discrimination” when relying on census statistics and Home Mortgage Disclosure Act (HMDA) data, where there is no possibility of differentiating individuals of varying skin color within a category of race or national origin, as evidence of discrimination.¹¹⁰ Such an approach only serves to reinforce the courts’ dual inclinations to view race and racial categories as a Black/White binary and to conflate race and color protections under the civil rights statutes.

When one looks at the complicated legislative history set forth in Part I of this Article, the tension between the language used in the statute (“race, color, . . . or national origin”) and the words used to ascribe meaning to the statutory language is stark. The tension between color and colored, which has played out as a convergence of the color and race constructs, is a legacy of the debates preceding the Civil Rights Act of 1964. Courts have been disinclined to fill in definition to the color protection or more clearly differentiate it from the race protection. So it is left to another actor—plaintiff, defendant, attorney or other—to fill in the

108. That the strategy of pleading “race or color discrimination” has been widely used is unsurprising. At first glance, employing such a strategy provides litigants the most flexibility. Flexibility in pleading has always been important in discrimination cases, especially where the defendant’s suspected internal considerations or biases may form the basis of plaintiff’s intentional discrimination claim. In other words, because a plaintiff does not know conclusively if her skin color or her race was the basis for unfair treatment, it is safest for her to plead “race or color discrimination” to cover her bases. And since courts generally treat the terms the same, there has been little risk to the particular client in maintaining the most flexibility possible. The broader risk, as set forth herein, is the persistent conflation of the race and color protected classes and the resulting limited jurisprudence on color discrimination that constrains civil rights protections to traditional notions of race discrimination.

109. See, e.g., Complaint at paras. 19–21, 53, *Fair Hous. Justice Ctr., Inc. v. Revlyn Apartments, LLC*, No. CV12-1336 (E.D.N.Y. Mar. 19, 2012) (alleging “discrimination . . . because of race or color” as evidenced through allegations of differential treatment of African Americans and Whites at the subject property). The most common kind of match-pair testing generally involves a series of “secret shopper” testers who pose as prospective tenants and gather evidence about differential treatment of prospective tenants that may be attributed to the tester’s membership in a particular subclass of a protected class.

110. See, e.g., Complaint and Demand for Jury Trial at paras. 46, 51–53, 61, 200, *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, No. 1:08-cv-02584-NLH-JS (D.N.J. May 27, 2008) (citing to 2000 Census statistics regarding the percentage of Whites, African Americans, and Hispanics from county and block levels in Mount Holly Gardens to support allegations of “race, color and national origin” discrimination); Complaint at paras. 125–26, 303, *Smith v. Bernard Mortgage Corp.*, No. 1:10-cv-05440 (N.D. Ill. Aug. 27, 2010) (citing to HMDA data, among other sources, to allege individual and class violations of the Equal Credit Opportunity Act for discrimination on the bases of race, color, and sex).

gap left by the legislature and the courts. In the absence of pressure from one of those actors, the jurisprudence on color discrimination will languish and will fail to develop to more effectively combat discrimination in our nation.

III. DEFINING AND DELINEATING “PEOPLE OF COLOR”

In the absence of movement from the legislature or courts to define color discrimination, distinguish it from race discrimination, or identify the bounds of its subcategories, advocates and litigators have stepped in to fill the breach. One significant move is the recent trend to import the people of color construct into civil rights suits.¹¹¹ In the last decade, there has been a surge of civil rights complaints that explicitly reference people of color. The final section of this part looks at that trend. Before getting there, however, this part sets the stage by tracing the past and current use of racial labels used for the Black community. It also addresses the recent adoption of the term people of color to include Blacks and other non-White minorities. By analyzing the different racial labels applied to the same community, this part establishes two important and related themes. First, that labels are mutable and the meaning ascribed to them is variable based on time, place, and speaker. Second, that labels are meaningful to those being labeled and those doing the labeling. Both because of, and in spite of, those related themes, litigants must carefully consider how they identify and label their identity for the specific purpose of making out a legal claim under the current anti-discrimination statutes.

A. A Brief History of “People of Color”

Although the term “people of color” is used regularly in social and cultural discourse today, it is not a new term of identification. In *The Color of Words: An Encyclopaedic Dictionary of Ethnic Bias in the United States*, cultural anthropologist Philip Herbst begins his definition of “people of color, People of Color” with an explicit acknowledgement that the terms have been “long in English usage for any nonwhite category.”¹¹²

In fact, a search of early statutory language confirms Herbst’s assessment and reveals that the term was originally employed as a divisive and exclusionary device for oppression of those deemed to be “of color.”

111. This analysis is particularly concerned with the dangers inherent in defining people of color as a bounded subclass of color. For the reasons set forth in Section II.C, *supra*, however, discrimination allegations on behalf of or involving people of color are not always explicitly limited to claims of color discrimination. Rather, the claims arise under anti-discrimination statutes alleging color discrimination, race discrimination or “race and/or color discrimination.” See *infra* Section III.C.

112. PHILIP H. HERBST, *THE COLOR OF WORDS: AN ENCYCLOPAEDIC DICTIONARY OF ETHNIC BIAS IN THE UNITED STATES* 178 (1997). Herbst seeks to provide an “extensive reference collection devoted solely to the diverse and often disputed lexicon of American ethnic life and identity.” *Id.* at ix.

For example, in 1803, Congress enacted a federal statute titled “An Act to Prevent the Importation of Certain Persons into Certain States, Where, by the Laws Thereof, Their Admission is Prohibited”¹¹³:

[N]o master or captain of any ship or vessel, or any other person, shall import or bring, or cause to be imported or brought, any negro, mulatto, or other person of colour, not being a native, a citizen, or registered seaman of the United States, or seamen natives of countries beyond the Cape of Good Hope, into any port or place of the United States, which port or place shall be situated in any state which by law has prohibited or shall prohibit the admission or importation of such negro, mulatto, or other person of colour¹¹⁴

An 1830 Report of the Proceedings of the Pennsylvania Colonization Society notes “[o]f all the descriptions of our population, and of either portion of the African race, the free people of color are, by far, as a class, the most corrupt, depraved and abandoned.”¹¹⁵ The Pennsylvania Colonization Society, an auxiliary of the American Colonization Society, aimed to “transport to the Western shores of Africa, from the United States, all such free persons of color as choose voluntarily to go.”¹¹⁶ In 1839, the District of Columbia Circuit Court upheld “[a]n act concerning free negroes, mulattoes, and slaves,” passed on [May 31], 1827,” which prohibited any “free black or mulatto person” from freely moving through Washington after 10:00 pm, excepting any “person of color passing peaceably through the streets to or from a meeting-house or place of worship; [or] any person of color sent on an errand by the owner or employer of such person.”¹¹⁷ And, in 1927, a Georgia anti-miscegenation statute punished “[a]ny charge or intimation against a white female of having sexual intercourse with a person of color”¹¹⁸ Another Georgia statute provided definition: “All negroes, mulattoes, and their descendants, having any ascertainable trace of . . . either Negro or African, West Indian, or Asiatic Indian blood in his or her veins, shall be known in this State as persons of color.”¹¹⁹

It is telling that in *Dred Scott v. Sandford*,¹²⁰ as support for its finding that the Black plaintiff held no rights or privileges afforded by the United States Constitution, the Supreme Court identified a series of local

113. AN ACT TO PREVENT THE IMPORTATION OF CERTAIN PERSONS INTO CERTAIN STATES, WHERE, BY THE LAWS THEREOF, THEIR ADMISSION IS PROHIBITED (Feb. 28, 1803), http://avalon.law.yale.edu/19th_century/sl003.asp (last visited Oct. 9, 2014).

114. *Id.*

115. PENNSYLVANIA COLONIZATION SOCIETY, REPORT OF THE BOARD OF MANAGERS OF THE PENNSYLVANIA COLONIZATION SOCIETY 35 (1830).

116. *Id.* at 36.

117. *Nichols v. Burch*, 18 F. Cas. 187 (C.C. D.C. 1839) (quoting bylaw of the corporation of Washington of 31st May, 1827, § 6).

118. *Legal Map: Accessible Version*, LOVINGDAY (quoting GA. CODE ANN. § 105–707 (1927)), <http://www.lovinday.org/legal-map-accessible> (last visited Feb. 20, 2015).

119. *Id.* (quoting GA. CODE ANN. § 79–103).

120. 60 U.S. 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

and federal laws that held the “African race” as a class separate and distinct from “people” and “citizen[s].”¹²¹ For example, the Court pointed to an 1813 Act of Congress that separately identified citizens of the United States and persons of color:

That from and after the termination of the war in which the United States are now engaged with Great Britain, it shall not be lawful to employ, on board of any public or private vessels of the United States, any person or persons except citizens of the United States, *or* persons of color, natives of the United States.¹²²

The Court found this example “decisive” of the government’s differentiation between citizens and persons of color, finding that “[p]ersons of color, in the judgment of Congress, were not included in the word citizens, and they are described as another and different class of persons.”¹²³ The Court also relied on Attorney Generals William Wirt and Caleb Cushing’s assessment that free persons of color were not a category of people contained within the meaning of citizens of the United States.¹²⁴

It appears that, in the late 1800s, the term people of color lost its traction in official and popular discourse. That is not to say, however, that labels used to categorize Blacks and other non-White minorities were not utilized. In fact, the people of color classification is one in a long line of labels that have been used to define or include Blacks in America.¹²⁵ In the mid- to late- nineteenth century, the term colored dominated the landscape.¹²⁶ As seen in the legislative history cited earlier, the colored label competed with the term Negro as a reference to Blacks, depending on the speaker and intended meaning. The term Negro gained acceptance in the late nineteenth century, shepherded into popular

121. *Id.* at 393, 410.

122. *Id.* at 420 (quoting Act of 1813, 2 Stat. 809).

123. *Id.* at 420–21.

124. *Id.* at 421.

125. The language of categorizing Blacks in America is one of the most striking examples of the changing language of group categorization. It is not, however, the only example. In fact, the concept of shifting terms of categorization does not belong only to the spectrum of racial categorization. Those individuals who are members of or are perceived to be members of the LGBTI community, for example, have witnessed dramatic shifts in categorization, both external and internal. What’s more, the changing use of the term “queer” from an external classification with offensive undertones to the language of self-categorization stands as a fascinating example of the way that language and the language of categorization has powerful meaning beyond the simple act of grouping. See Angela Clements, *Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII & an Argument for Inclusion*, 24 BERKELEY J. GENDER L. & JUST. 166, 200 (2009); Nancy J. Knauer, *Gender Matters: Making the Case for Trans Inclusion*, 6 PIERCE L. REV. 1, 37 (2007).

126. Tom W. Smith, *Changing Racial Labels: From “Colored” to “Negro” to “Black” to “African American,”* 56 PUB. OPINION Q. 496, 497 (1992). In 1992, at the time the article was published, Smith was Director of the General Social Survey, a flagship survey of the National Opinion Research Center. *Id.* at 496. His article traced the changing labels ascribed to and adopted by Blacks in America. See *id.* at 496–97. For a slightly different take, see Lerone Bennett Jr., *What’s In a Name? Negro vs. Afro-American vs. Black*, 23 EBONY 46 (1967).

parlance by Booker T. Washington and W.E.B. DuBois.¹²⁷ Later, as the 1950s and 1960s marshaled in the civil rights movement, a desire to break from labels and identities placed on the Black community by Whites caused a shift in racial terminology from Negro to Black.¹²⁸ Tom W. Smith, former Director of the General Social Survey, explained that the Black label was applied to those deemed “progressive, forward-looking, and/or radical,” but became largely accepted and lost its radical connotation by the early 1970s.¹²⁹ The term Black remained the self-identification label of choice, and was largely accepted by Whites as well, until 1988, when “Romana H. Edelin, president of the National Urban Coalition, proposed [a switch to the label] ‘African-American.’”¹³⁰ Heralded by Jesse Jackson, the term “African-American” sought to “give Blacks a cultural identification with their heritage and ancestral homeland.”¹³¹ A decade later, in 2005, a study using data drawn from the National Survey of Black Workers from 1998–2000 showed that Blacks nearly equally preferred the labels “black” and “African-American.”¹³² It also established that “the popularity that ‘African-American’ achieved during the early 1990s did not grow during the ensuing decade and that, if anything, ‘black’ has enjoyed a modest resurgence.”¹³³

The term people of color has also enjoyed a comeback. Once disparaging to its members, the people of color label has been re-appropriated by many who self-identify as members. In 1963, the Reverend Dr. Martin Luther King, Jr. resurrected the phrase when he referred to “citizens of color” in his famous “I Have a Dream” speech.¹³⁴ Dr. King asserted: “It is obvious today that America has defaulted on this promissory note, insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked ‘insufficient funds.’”¹³⁵ Dr. King’s use of the term “citizens of color” adopted and coopted it as a term of self-categorization. It was not used in a derogatory sense. Intentionally or not, Dr. King’s use of the term collapsed the differentiation of

127. Smith, *supra* note 126, at 497.

128. *Id.* at 499.

129. *Id.* at 499, 502.

130. *Id.* at 503; *see also* Bannai & Enquist, *supra* note 19, at 40 n.49 (explaining that the term African American has itself undergone transformation, used with and without the hyphen to consciously connote different meanings); Morris, *supra* note 19, at 543 n.25.

131. Smith, *supra* note 126, at 507.

132. Lee Sigelman, Steven A. Tuch & Jack K. Martin, *What’s In a Name? Preference for “Black” Versus “African-American” Among Americans of African Descent*, 69 PUB. OPINION Q. 429, 430, 433–34 (2005). The study showed that neither gender nor level of education changed the preference of the “black” or “African-American” label, but that age, city size, and region had an impact; younger residents of large cities outside of the South preferred “African-American” to “black.” *Id.* at 434.

133. *Id.* at 434.

134. Martin Luther King, Jr., *I Have a Dream, Speech at the March on Washington* (Aug. 28, 1963) (transcript available at <http://www.americanrhetoric.com/speeches/mlkihaveadream.htm>).

135. *Id.*

citizen and people of color that formed the basis of the *Dred Scott* decision.

Interestingly, and in tension with the way society generally defines the term today, Dr. King used the term “citizens of color” term interchangeably with “the Negro people.” Such an insight is fascinating when placed in historical context. As set forth above, in 1963, Congress was hotly engaged in the debate over the law that would become the Civil Rights Act of 1964. The 88th U.S. Congress House of Representatives, which served from January 3, 1963, to January 3, 1965, had 435 members.¹³⁶ Together with the Senate, there were 535 legislators, yet only a handful of Black lawmakers.¹³⁷ Therefore, the language of racial categorization used by those members of Congress is seemingly representative of labels placed on one group by another group, rather than the self-categorization language utilized by Dr. King. The racial categorization language most regularly used by those members of Congress in the legislative history of the Civil Rights Act of 1964 was colored and Negro. Such choices represent both an overlap (with the use of the term Negro) and a contrast (with the use of the term colored) to Dr. King’s self-categorization language of “citizens of color” and “the Negro people.”

In the wake of Dr. King’s use of the term “citizens of color” as self-definitional and exclusive of non-Black citizens, the term people of color has expanded over time to become more inclusive of non-Black communities generally regarded as ethnic or racial minorities. For example, in the 2008 *Encyclopedia of Race, Ethnicity and Society*, Salvador Vidal-Ortiz defines the phrases “people of color” and “person of color” as reference to “racial and ethnic minority groups.”¹³⁸ Vidal-Ortiz also explicitly acknowledges the mutability of the terms over time and location. He notes that the terms have “a strong association to phenotype, skin color, and eye/hair/other physiological aspects that often defined Blacks in the United States,” but also observes that the political and coalitional power of terms permit a person or group to self-identify, not only by their country of origin or panethnic label, but also by the more inclusive term person of color.¹³⁹ He insightfully notes,

136. U.S. JOINT COMM. ON PRINTING, POCKET CONGRESSIONAL DICTIONARY: EIGHTY-EIGHTH CONGRESS 181 (1963) [hereinafter POCKET CONGRESSIONAL DICTIONARY], <http://babel.hathitrust.org/cgi/pt?id=mdp.39015073070453;view=1up;seq=1>; *Black-American Representatives and Senators by Congress, 1870–Present*, UNITED STATES HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-Congress/> (last visited Nov. 20, 2015).

137. POCKET CONGRESSIONAL DICTIONARY, *supra* note 136, at 181; *Black-American Representatives and Senators by Congress, 1870–Present*, *supra* note 136.

138. Salvador Vidal-Ortiz, *People of Color*, in *ENCYCLOPEDIA OF RACE, ETHNICITY, AND SOCIETY* 1037 (Richard T. Schaefer ed., 2008).

139. *Id.* at 1037–38.

People of color is, however it is viewed, a political term, but it is also a term that allows for a more complex set of identity for the individual—a relational one that is in constant flux. Immigration, travel, and racial constructs—in general, people’s social world—all have an impact on how changing these identifications may be. It is perhaps because of the flexibility in identification that the term has become significant in biracial and multiracial writings (and for individuals) as a term that better helps to identify people with multiple national origins, panethnic backgrounds, or so-called racial makeup.¹⁴⁰

However complicated and changing the “of color” terms have been over the last few decades, they have enjoyed growing acceptance and popularity in mainstream society. In 1988, William Safire wrote an article for the *New York Times* noting that the phrase “people of color has never been more in vogue.”¹⁴¹ And, although seemingly still outpaced by the term “minorities,”¹⁴² the term people of color is now considered a primary term of racial categorization.

Legal academic scholarship has embraced the label people of color and related terms, invoking the “of color” modifier with abandon. More than 200 law review and journal articles use a related term in their title.¹⁴³ Scholarship abounds about how communities of color, women of color, faculty of color, and students of color shape, and are shaped by, every facet of law and policy. And legal scholars of color have united, formally and informally, to offer support and energy to each other in the battle against institutional, social, and political forces that have kept the legal profession and legal academia exclusive and homogeneous. In her article, *From Tokenism to Emancipatory Politics: The Conferences and Meetings of Law Professors of Color*, Linda Greene traces the history of various “People of Color . . . [c]onferences” since 1967, a movement that led to “The First National Meeting of the regional People of Color Legal Scholarship Conferences” in 1999.¹⁴⁴ Greene identifies the critical nature of such meetings and conferences to be “catalytic forces in the breakdown of apartheid in American legal education, essential to the survival and prosperity of minority scholars in a continuing environment of tokenism, and central in the development of distinctive legal scholarly

140. *Id.* at 1038.

141. William Safire, *On Language: People of Color*, N. Y. TIMES, Nov. 20, 1988, at A18.

142. Kee Malesky, *The Journey from ‘Colored’ to ‘Minorities’ to ‘People of Color,’* NPR (Mar. 31, 2014, 4:00 PM), <http://www.npr.org/sections/codeswitch/2014/03/30/295931070/the-journey-from-colored-to-minorities-to-people-of-color>.

143. WESTLAW NEXT, <http://next.westlaw.com> (last visited Nov. 20, 2015) (searching “People of Color”).

144. Linda S. Greene, *From Tokenism to Emancipatory Politics: The Conferences and Meetings of Law Professors of Color*, 5 MICH. J. RACE & L. 161, 161, 164–65 (1999) [hereinafter Greene, *Tokenism*]; see also Linda S. Greene, *From Sea to Shining Sea: The Midwestern Origins of the First National Meeting of the Regional People of Color Legal Scholarship Conferences*, 20 B.C. THIRD WORLD L.J. 29, 29 (2000); Neil G. Williams, *Two Men and Twenty Years of Meetings: Norman Amaker, Derrick Bell, and the Midwestern People of Color Legal Scholarship Conference from 1990-2010*, 42 LOY. U. CHI. L.J. i, i, v (2011).

voices unique to the ‘outsider’ perspective of minority professors.”¹⁴⁵ In the last several years, many legal “People of Color conferences” have occurred as minority scholars continued to unite under the banner of people of color and scholars of all races continue to discuss the intersection of law, race, business, society, and politics.¹⁴⁶

The label people of color and related terminology have also infused the mainstream lexicon, as represented in local and national news. Newspaper articles from just one week in 2014 (October 5–11) are filled with references to people of color and other, similarly identified groups. The *Associated Press* identified Laurel Richie as “the first woman of color to lead a professional sports league.”¹⁴⁷ The *Washington Post* reported that a conference entitled “Moving Social Justice” is the “first-of-its-kind conference to be held by atheists of color.”¹⁴⁸ And *USA Today* ran a story about the *New York Times*’ commitment to diversifying its staff, after a “firestorm . . . about diversity” followed from a review of the television show *How to Get Away with Murder*, which raised questions “about diversity and how people of color are covered.”¹⁴⁹ Outreach and grassroots organizations have adopted the modifier into their names: “For People of Color, Inc.” provides law school admissions consulting services to prospective law school applicants;¹⁵⁰ “The People of Color Networks” helps adults and children with behavioral health diagnoses;¹⁵¹ “Trans People of Color Coalition” promotes the interests of transgender persons of color;¹⁵² and the “National Organization for People of Color

145. Greene, *Tokenism*, *supra* note 144, at 164.

146. See *About Us*, SESWPOCC, <http://www.seswpocc.org/about/> (last visited Feb. 20, 2015) (detailing Southeast/Southwest People of Color Legal Scholarship Conferences each year from 2005–2013 and 2015); *Northeast People of Color (NEPOC) Legal Scholarship Conference 2008*, B.U. SCH. L., <http://www.bu.edu/law/nepoc/> (last visited February 20, 2015) (recognizing Northeast People of Color Legal Scholarship Conference in 2008 at University of Buffalo Law School); *The 20th Mid-Atlantic People of Color (MAPOC) Conference*, W. VA. U. C. L., <http://law.wvu.edu/mapoc2015> (last visited February 20, 2015) (describing the recent 20th Mid-Atlantic People of Color Conference at West Virginia University School of Law held in January 2015); *Third National People of Color Conference*, SETON HALL U. S. L., http://law.shu.edu/About/News_Events/thirdnationalpoc/index.cfm (last visited February 20, 2015) (discussing the Third National People of Color Conference at Seton Hall Law School in 2010).

147. Report: *WNBA Industry Leader for Diverse Hiring*, ASSOCIATED PRESS (Oct. 8, 2014, 4:45 PM), <http://www.foxsports.com/wnba/story/report-wnba-industry-leader-for-diverse-hiring-100814>.

148. Kimberly Winston, *Black Atheists Say Their Concerns Have Been Overlooked for Too Long*, WASH. POST (Oct. 9, 2014), http://www.washingtonpost.com/national/religion/black-atheists-say-their-concerns-have-been-overlooked-for-too-long/2014/10/09/051d9e04-4fc9-11e4-877c-335b53ffe736_story.html.

149. Arienne Thompson, ‘NYT’ Editor: ‘I Have an Obligation to Diversify The Staff’, USA TODAY (Sept. 24, 2014, 3:29 PM), <http://www.usatoday.com/story/life/people/2014/09/24/nyt-editor-i-have-an-obligation-to-diversify-the-staff/16163107/> (citation omitted).

150. See *About*, FOR PEOPLE OF COLOR, INC., <http://forpeopleofcolor.org/about/> (last visited Nov. 20, 2015).

151. See *About Us*, PEOPLE OF COLOR NETWORK, http://www.pocn.com/cms/en_US/about-us.html (last visited Nov. 30, 2015).

152. See TRANS PEOPLE OF COLOR COALITION, <http://www.glaad.org/tags/trans-people-color-coalition> (last visited Nov. 20, 2015).

Against Suicide” addresses the issue of suicide prevention and intervention in communities of color.¹⁵³

The history of the term people of color, set alongside the various other labels and classifications that have been employed to describe Blacks and other non-White minorities, is marked by variability. It began as a derogatory label employed to set apart those considered non-citizens and less than human. It was replaced by a number of other labels, both set upon the member group and chosen by the members themselves, over time. Ultimately, it reemerged, adopted by the most prominent African American leader of the civil rights movement to describe the impetus behind the movement—racial inequality assessed in a Black/White binary. Over time, in an effort to capture capacity and build solidarity, it has taken on a broader meaning, encompassing a large and shifting number of individuals who identify as non-White or minority.

As the meaning of the term people of color has varied depending on time, place, and speaker, the mutability of the term itself requires pause to consider the utility and benefit of employing such a label. As noted several times herein, there is a strong argument that the inclusive nature of such categorization promotes coalition building among historically disenfranchised groups.¹⁵⁴ Paulette Caldwell, for example, notes the common thread of White supremacy that has dominated American history and stands as a critical element of progressive race methodology across race and ethnicity.¹⁵⁵ She also warns, however, of the critical import of simultaneously “uncovering . . . specific group histories” and accounting for differing stories of White supremacy in each group’s unique history.¹⁵⁶ Such an insight touches on the significant danger in employing the term people of color as a racial or ethnic label—the danger in essentializing the individuals and subgroups contained in the people of color construct.¹⁵⁷ That is especially the case here, where the history of the term people of color establishes that its meaning is mutable and the inclusivity of the term shifts and changes over time and depending on the context of its usage. Further, adoption of the term people of color does little to dislodge the binary assessment of race in America. Rather, Caldwell has argued that its use has simply shifted the focus from a

153. See NATIONAL ORGANIZATION FOR PEOPLE OF COLOR AGAINST SUICIDE, <http://www.ncsp.org/nopcas.html> (last visited Feb. 17, 2015).

154. See Caldwell, *supra* note 8, at 55; Deborah Ramirez & Jana Rumminger, *Race, Culture, and the New Diversity in the New Millennium*, 31 CUMB. L. REV. 481, 500 (2001); Vidal-Ortiz, *supra* note 138, at 1038.

155. Caldwell, *supra* note 8, at 77–78.

156. *Id.*

157. *Id.* at 62 (recognizing that “[c]ommon condition does not lead readily to common consciousness”).

Black/White binary assessment of race to a non-White/White binary assessment of race.¹⁵⁸

B. The Language of Racial Categorization is Meaningful

While the adoption of the term people of color carries potential benefits to those who identify as or are identified as members of the categorization, the effect of its adoption is not absolutely positive or negative. Labels have profound effects, both internally and externally. Depending on whether the label is self-imposed or imposed by those outside of the member groups, the impact may differ significantly.

The effect of labeling groups may especially be felt when categorization and labeling occurs in formal law and legislation. SpearIt argues:

Among the most influential in the day-to-day American lexicon are words from constitutions, statutes, and U.S. Census survey questionnaires. This set of laws and institutions, formal and informal, work together and have a profound influence on the way Americans conceive and speak of one another. Law helps structure routine practices of life by generating compliance or acts of resistance and by providing a framework for legitimate discourse and action in the exercise of power.¹⁵⁹

For minority groups underrepresented in government, racial labeling and categorization in formal legal structures, including the language used in the debates preceding the passage of the Civil Rights Act of 1964, generally invoke labels placed on groups rather than terms of self-definition.¹⁶⁰

Omi Leissner recognizes that “names and naming reflect, and often reify relations of dominance and subordination.”¹⁶¹ That is not to say, however, that labels imposed on groups may not, in the end, be empowering to the identified group. Christine Hickman identifies the latent power in being labeled or defined as a member of a particular group. Her argument that the so-called “one drop rule” ultimately had profound benefit in creating solidarity and power in the Black community recognizes

158. See *id.* at 63 (arguing that much of the critique of the Black/White paradigm of racial assessment “does little more than substitute alternative binary or other constructions for the existing dominant paradigm without attending to the consequences of these reconstructions for the ultimate goal of ending racial subordination”); see also Martha Minow, Foreword, *Justice Engendered*, 101 HARV. L. REV. 10, 13–14, 70–73 (1987) (recognizing that “difference” is a relative comparison and that the language employed to categorize and define individuals and groups takes on implicit assumptions about “whose point of view matters”).

159. SpearIt, *Enslaved by Words: Legalities & Limitations of “Post-Racial” Language*, 2011 MICH. ST. L. REV. 705, 710; cf. Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1666–67 (1990) (recognizing and detailing how words and word choice impact the way that society views family violence).

160. For further discussion, see Hickman, *supra* note 94, at 1165–67; SpearIt, *supra* note 159, at 710; Naomi Zack, *American Mixed Race: The U.S. 2000 Census and Related Issues*, 17 HARV. BLACKLETTER L.J. 33, 34, 41 (2001).

161. Omi Leissner, *Naming the Unheard Of*, 15 NAT’L BLACK L.J. 109, 109 (1997–1998).

the impact of labeling, both positive and negative, even when the label is externally imposed.¹⁶² She notes:

So it was with the one drop rule. The Devil fashioned it out of racism, malice, greed, lust, and ignorance, but in so doing he also accomplished good: His rule created the African-American race as we know it today, and while this race has its origins in the peoples of three continents and its members can look very different from one another, over the centuries the Devil's one drop rule united this race as a people in the fight against slavery, segregation, and racial injustice.¹⁶³

One may make the same argument about the term people of color. Originally employed to exclude and dehumanize, over time, individuals who self-identify as people of color have co-opted the term as a symbol of broad-based cultural and political power.

It is worth pausing here to discuss the context of the increased use of the people of color label as it is set alongside the "People First" movement in the disability rights context. People First describes a self-advocacy movement of individuals previously labeled and identified as "retarded" or "mentally retarded."¹⁶⁴ Born out of the Swedish Parents Association for Mentally Retarded Children in the late 1960s, the seemingly simple concept is, at its heart, that people labeled retarded could, and should, have a role in making choices about their own lives.¹⁶⁵ The movement led to the passage of laws that specifically changed the words used in legislation to reflect a shift in thinking about persons with disabilities. Rosa's Law, for example, passed in 2010, identified specific statutes relevant to people with disabilities and amended certain words to explicitly reflect a language shift in labeling individuals with disabilities.¹⁶⁶ In Washington D.C., the People First Respectful Language Modernization Amendment Act, passed in 2012, amended more than twenty-five specific District of Columbia laws to formally and legally relabel "the handicapped" and "mentally retarded persons" as "persons with disabilities" and "persons with intellectual disabilities."¹⁶⁷ The ARC, a national organization that advocates for and serves people with intellectual and developmental disabilities and their families, describes the import of the language change:

162. Hickman, *supra* note 94, at 1166.

163. *Id.*

164. See JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 195 (1993).

165. *Id.*

166. Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643, 2643-45 (2010); See Sarah E. Redfield & Theresa Kraft, *What Color is Special Education?*, 41 J.L. & EDUC. 129, 148 n.113 (2012).

167. People First Respectful Language Modernization Amendment Act of 2012, D.C. Law 19-169 (2012), 2011 Bill Text DC B. 169 (LEXIS). The People First Respectful Language Modernization Amendment Act of 2012 followed the original legislation, which was passed in 2006. People First Respectful Language Modernization Act of 2006, D.C. Law 16-169 (2006).

The language a society uses to refer to persons with disabilities shapes its beliefs and ideas about them. Words are powerful; Old, inaccurate, and inappropriate descriptors perpetuate negative stereotypes and attitudinal barriers.

...

Our words and the meanings we attach to them create attitudes, drive social policies and laws, influence our feelings and decisions, and affect people's daily lives and more. How we use them makes a difference. People First Language puts the person before the disability, and describes what a person has, not who a person is. Using a diagnosis as a defining characteristic reflects prejudice, and also robs the person of the opportunity to define him/herself.¹⁶⁸

Like the People First movement in the disability rights context, self-identification as people of color symbolizes the members' control of their label and the authority to define the members of their category.¹⁶⁹

Unlike the People First movement, however, people of color terminology has not been incorporated into formal law in the same way.¹⁷⁰ In fact, although there has been some recent movement to incorporate the term people of color and related terminology into formal legislation, the terms and their influence on the law remain generally marginalized. They

168. *What is People First Language?*, THE ARC, <http://www.thearc.org/who-we-are/media-center/people-first-language/> (last visited Nov. 20, 2015).

169. The "People First" movement has some similarities to the people of color movement, but there exist several differences that are important to an in-depth critical assessment of the two movements. Most importantly, the role of perception plays a different legal role when discussing a person with disabilities and a person of color in the context of civil rights laws. Both the Americans with Disabilities Act and the Rehabilitation Act explicitly provide protection for discrimination against one who is "perceived" as having a disability. *See* Americans with Disabilities Act of 1990 § 2(a)(1), 42 U.S.C. § 12101(a)(1) (2012); Rehabilitation Act of 1973 § 2(a)(4), 29 U.S.C. § 701(a)(4) (2012) (amended 2014). There is no similar protection in the Civil Rights Act of 1964. It may be possible to argue that perception of protected status (i.e., race or color) should create a cause of action under civil rights laws. For example, if a Caucasian person submits a resume for a job and is not interviewed for the position because the employer believes that her name is a name commonly associated with an African American, the applicant may have a cause of action for race discrimination. Some courts, however, have been reluctant to find that perception of protected status provides protection under Title VII and related laws. *See, e.g.,* *Butler v. Potter*, 345 F. Supp. 2d 844, 850 (E.D. Tenn. 2004) (granting summary judgment to employer defendant because: "Title VII protects those persons that belong to a protected class, *see* 42 U.S.C. § 2000e-2(a)(1), and says nothing about protection of persons who are *perceived* to belong to a protected class. . . . Congress has shown, through the Rehabilitation Act, and the Americans with Disabilities Act that it knows how to enact legislation that protects persons who are wrongly perceived to be in a protected class. Neither party has cited any controlling authority which would permit a claim for perceived race or national origin discrimination and this Court is unaware of any such precedent."); *see also* *Lewis v. N. Gen. Hosp.*, 502 F. Supp. 2d 390, 401 (S.D.N.Y. 2007) ("[T]he protections of Title VII do not extend to persons who are merely 'perceived' to belong to a protected class." (citing *Uddin v. Universal Avionics Sys. Corp.*, No. 1:05-CV-1115-TWT, 2006 U.S. Dist. LEXIS 47238, at *14 (N.D. Ga. June 30, 2006); *Butler v. Potter*, 345 F. Supp. 2d 844, 850 (E.D. Tenn. 2004))). Although additional analysis about the relationship between the two movements would be of value, it is outside the scope of this Article.

170. I make no comment here on whether the incorporation of the "People First" language in formal law has made any noticeable difference in the treatment of or discrimination against people with disabilities.

are located primarily in a statutory context that will not be binding in law. For example, in the “Findings” section proposed for the Women’s Educational Equity Act of 2001, Congress found that “classroom textbooks and other educational materials do not sufficiently reflect the experiences, achievements, or concerns of women and, in most cases, are not written by women or persons of color.”¹⁷¹ And, whether a program would “address the needs of women and girls of color and women and girls with disabilities” is the first listed criterion for whether the Secretary can issue awards under the program.¹⁷² Similarly, in a statute titled “Equal Access to the Administration’s Education Programs,” the Administrator is challenged to “bring more women of color into the field of space and aeronautics.”¹⁷³ The Obama Administration created an Office of Minority Health to provide resources to communities of color; developed an Office of Minority and Women Inclusion to promote women and people of color in the banking industry; and established a White House Council on Women and Girls “to ensure that Federal programs and policies address and take into account the distinctive concerns of women and girls, including women of color and those with disabilities.”¹⁷⁴ Policymakers today are seemingly walking a fine line—adopting the terminology of the of color modifier, but only in locations and ways that will have little to no influence on the implementation of law. Although there is value in the language employed in explanatory or aspirational findings or promotions, there is no legal accountability or remedy for failure to meet those goals.

While there is much to be said about the power of categorization and the language used to identify the relevant categories, there is not universal acceptance or appreciation of the benefit of labeling. In fact, activists and scholars have warned against giving any label too much power. In 1928, W.E.B. Du Bois, responded to the call that the term Negro be abandoned as a label:

Do not . . . make the all too common error of mistaking names for things. Names are only conventional signs for identifying things. Things are the reality that counts. If a thing is despised, either because of ignorance or because it is despicable, you will not alter matters by changing its name. If men despise Negroes, they will not despise them less if Negroes are called “colored” or “Afro-Americans.”

. . .

171. Women’s Educational Equity Act of 2001, 20 U.S.C. § 7283(b)(3)(B) (2012).

172. *Id.* § 7283d(a).

173. 51 U.S.C. § 40906(c) (2012).

174. See 12 U.S.C. § 4520 (2012); 42 U.S.C. § 300u-6(a) (2012); Exec. Order No. 13,506, 74 Fed. Reg. 11271 (2009), *reprinted as amended in* 42 U.S.C. § 2000e (2012).

[A] Negro by any other name would be just as black and just as white
... It is not the name--it's the Thing that counts.¹⁷⁵

Nearly a century later, SpearIt catalogues and critiques the terms of racial categorization of the Black community in America throughout the decades.¹⁷⁶ He notes, for example, that use of the terms “nigger” and “Negro” used language to objectify by color.¹⁷⁷ And he makes no distinction with the application of the term “black” as a label of racial categorization, arguing that “the replacement term ‘black’ had the same import, since this word was like saying ‘nigger’ in English.”¹⁷⁸ Ultimately, SpearIt concludes that the terms “person of color” and “people of color” fare no better.¹⁷⁹ Such terms, he avers, evoke a biased dichotomy of White (pure, good) versus non-White (impure, bad).¹⁸⁰ He argues that “[l]anguage facilitates the process of objectification as required by slavery and colonialism, and whiteness has been a defining part of culture for centuries, including the notion that white people are good and people of color are bad.”¹⁸¹ Tom Smith suggests that the importance and anxiety about racial labels for the American Black community is arguably connected to one or more of the following three theories: (1) enslaved Blacks were stripped of indigenous and varied identities and cultures and were long prohibited from developing their own institutions and community to advance their group identity; (2) because Blacks remain discriminated against, any name eventually becomes tainted by racial prejudice; and (3) some sense of an “inferiority complex.”¹⁸² If, as SpearIt and Smith suggest, all racial labels take on a disparaging meaning over time, is it worth the energy and effort necessary to change the labels? Does changing the label change the underlying racial bias or tension underlying the categorization?

Certainly, the history of changing labels affixed to and adopted by the American Black community over time suggests that labels do, in fact, carry great meaning. In fact, in the legal context, critical lawyering scholars and those advocating client-centered lawyering recognize the great importance of a client’s agency in defining oneself and one’s sto-

175. W.E.B. Du Bois, *The Name “Negro,”* in *THE CRISIS* 96, 96–97 (1928). I pause to consider, here, whether Du Bois’s sentiment could be applied to the debate about the difference between race discrimination and color discrimination. What is “the Thing” that counts in assessing the internal bias of one discriminating on the basis of race discrimination as compared to one discriminating on the basis of color? Such a query sits at the center of the scholarly debate on the relationship between racism and colorism. See, e.g., Banks, *Colorism*, *supra* note 56, at 1708–13; Harris, *supra* note 56, at 62–65; Jones, *supra* note 55, at 665–68.

176. SpearIt, *supra* note 159, at 732, 738–39.

177. *Id.* at 738.

178. *Id.*

179. *Id.* at 745–47.

180. See *id.* at 732.

181. *Id.*

182. Smith, *supra* note 126, at 511–12.

ry.¹⁸³ A client's narrative, including her self-identification, sets out something more than the context for her legal claim; it establishes her place in the world relative to the other players in her legal story.

The rest of this part identifies a recent trend in adapting the people of color construct into civil rights challenges, a move in itself that implies the meaningfulness of reimagining one's racial identity. The final part then argues that inserting people of color into civil rights challenges, while perhaps meaningful to give the plaintiff agency to self-define her category and subclass, may actually be counterproductive to the goals of the civil rights movement.

C. Pleading "People of Color"

There has been a recent trend in civil rights complaints to include allegations of violations of law against people of color,¹⁸⁴ a trend this Article deems problematic for the advancement of racial equality through rights-based legal challenges. The great majority of the complaints discovered using such language were filed after 2000. Such allegations arise in three primary forms. The first iteration involves complaints that invoke the term person of color to label the plaintiff. The second contains complaints labeling the class or group of people impacted by defendant's allegedly discriminatory actions as people of color. The final category, which comprises the greatest number of complaints, uses the term person of color or people of color in factual allegations to provide circumstantial evidence of race or color discrimination against particular plaintiffs.¹⁸⁵ As will be seen in Part IV, the complaints' invocation of the term people of color generally is, at best, neutral to the case's resolution and, at worst, risks contraction of civil rights protections.

Certain civil rights complaints identify the plaintiff as a person of color. In *Green v. Topnotch at Stowe*,¹⁸⁶ for example, plaintiff, an Afri-

183. See, e.g., Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2118–22 (1991); Margaret Moore Jackson, *Confronting "Unwelcomeness" From the Outside: Using Case Theory to Tell the Stories of Sexually-Harassed Women*, 14 CARDOZO J.L. & GENDER 61, 62–63 (2007); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 485–89 (1994).

184. There are many constitutional challenges brought pursuant to Sections 1981 and 1983 that allege discrimination against people of color or persons of color. This particular analysis, however, focuses on complaints that assert claims under the Civil Rights Act of 1964 and the Fair Housing Act of 1968 or their relevant amendments. The explicit color protected class under the Civil Rights Act of 1964 and the Fair Housing Act, combined with the unique historical setting underpinning the legislative history of those laws, provides the most apt analysis for this Article.

185. There are also certain complaints that use the people of color term or similar terms in the factual allegations in reference to a statement made by the defendant as evidence of race or color discrimination. See, e.g., Complaint at 4, *United States v. French*, No. 2:12-cv-15583-JCO-MJH (E.D. Mich. Dec. 20, 2012) ("Paula French stated that there were not many 'people of color' in the area where the subject property was located."); Complaint for Damages at 7, *Rivers v. Cty. of Marin*, No. 03-cv-01808 (N.D. Cal. May 1, 2003) ("The conduct included but was not limited to . . . (3) comments from supervisors stating that people of color and other disadvantaged 'nerthiwell's' 'should be lined up and shot.'").

186. No. 1: 06-CV-00096, 2008 WL 345886 (D. Vt. Feb. 7, 2008).

can American female, asserted violations of Title II of the Civil Rights Act of 1964 and her constitutional rights based on claims that she was unfairly suspected of and arrested for a crime she did not commit based on her race and color.¹⁸⁷ In her complaint, Ms. Green self-identified as a “person of color” and “of the African-American race.”¹⁸⁸ A plaintiff’s self-identification of herself as a person of color is the clearest example of how a party may, in the absence of guidance from the legislature or courts, seek to define the meaning of color discrimination and the boundaries of the subclass through which she can seek civil rights protection. It inserts the cultural concept of person of color into civil rights jurisprudence.

The second category of complaints using the term people of color requests relief on behalf of people of color. In other words, the complaints assert violations of federal civil rights laws on behalf of a larger group of people defined by their inclusion in the group labeled people of color. Like the first category, it involves a plaintiff or class of plaintiffs defining an undefined and unbounded group termed people of color as a subclass of the protected class of race or color. In *Darensburg v. Metropolitan Transportation Commission*,¹⁸⁹ for example, the plaintiffs alleged discrimination on the basis of race and national origin in the funding of public transit services in the San Francisco, California Bay Area.¹⁹⁰ Individual plaintiffs, along with organizational plaintiffs who are comprised of “people of color who are riders of the Alameda-Contra Costa Transit District,” aver that the “Defendant MTC has historically engaged, and continues to engage, in a policy, pattern or practice of actions and omissions that have the purpose and effect of discriminating against poor transit riders of color in favor of white, suburban transit users, on the basis of their race and national origin.”¹⁹¹

The complaint sought class certification to include “all people of color who are current and potential patrons of AC Transit.”¹⁹² The complaint asserted three separate causes of action, including a cause of action

187. *Id.* at *1–2.

188. Complaint with Demand for Jury Trial at para. 4, *Green*, No. 1:06-CV-00096 (D. Vt. May 11, 2006). The Plaintiff also alleged, in asserting violations under Section 1983, that “it was not a violation of [law] for Green to be a person of color, to possess maxipads, and/or to possess or use cornstarch for cosmetic purposes.” *Id.* at para. 121; *see also* Second Amended Complaint for Violation of Civil Rights with Jury Demand at 7, *Walker v. Hoppe*, 239 F. App’x 998 (M.D. Tenn. Aug. 17, 2005) (suing for employment discrimination on the basis of race and sex, the plaintiff brought a Title VII complaint based on her allegedly illegal discharge on the basis of race “merely for offering the perspective of ‘a person of color’ with competency/integrity”).

189. *Darensburg v. Metro. Transp. Comm’n.*, 611 F. Supp. 2d 994 (N.D. Cal. 2009).

190. First Amended Complaint for Injunctive and Declaratory Relief Pursuant to Fourteenth Amendment to The United States Constitution, 42 U.S.C. § 1983 Title VI of the Civil Rights Act of 1964 at para. 1, *Darensburg*, 611 F. Supp. 2d 994 (N.D. Cal. Oct. 11, 2005) (No. C-05-01597).

191. *Id.*

192. *Id.* at para. 24.

for violation of Title VI of the Civil Rights Act of 1964 for discrimination on the basis of race and national origin, but not color.¹⁹³

The final category of complaints in which people of color is employed involves factual allegations against a broader category of people of color to provide support for, or circumstantial evidence of, defendant's discrimination against the particular plaintiff(s). Those complaints vary in the asserted causes of action, but many do assert color as a protected class. In *Harris v. Sutton Motor Sales & RV Consignments Corp.*,¹⁹⁴ for example, the plaintiff alleged violations of Title VII, Section 1981, and various state laws arising from differential treatment, hostile work environment, and retaliation claims.¹⁹⁵ The plaintiff, an African American male, alleged race and color discrimination on the basis of factual allegations that he was treated differently from his Caucasian counterparts and was subjected to racial slurs and retaliation.¹⁹⁶ He also claimed that one supervisor would make comments about other minority groups, calling Hispanics, for example, "Josés."¹⁹⁷ On the basis of those factual allegations, Mr. Harris alleged that "Defendant's actions created a hostile work environment toward people of color that Plaintiff was subjected to" and that "Defendant's hostile work environment toward Plaintiff, because he is a person of color, constitutes a violation of [Title VII]."¹⁹⁸ Similarly, in *Martin v. State University of New York*,¹⁹⁹ the plaintiff, an African American female, alleged violations of Titles VI and VII for discrimination on the basis of race and color.²⁰⁰ Her factual allegations were based primarily

193. *Id.* at paras. 70–78; cf. Class Action Complaint at paras. 2–3, *Rodriguez v. Nat'l City Bank*, No. 2:08-cv-02059, 2008 WL 2547584 (E.D. Pa. May 1, 2008). In *Rodriguez*, four plaintiffs brought suit against the defendant bank alleging discriminatory practices in obtaining residential mortgage loans, which is a violation of the Fair Housing Act, among other federal and state laws. *Id.* at para. 1. The plaintiffs brought a proposed class action "on behalf of themselves and a class of all other similarly situated Minority . . . homeowners subjected to Defendants' discriminatory practices" *Id.* at para. 2. The complaint defined "Minority" to be "persons who are African-American or Black, as well as persons who are Hispanic or Latino." *Id.* at para. 3. The complaint is based, in part, on various studies related to wealth and the disproportionality of subprime mortgages offered to borrowers "of color." *Id.* at paras. 4–18. Unlike the single plaintiff in *Green*, however, the proposed class in *Rodriguez* alleges discrimination on the basis of race but does not specify color as a basis for legal protection. It begs the question whether use of the term "Minority" (presumably a synonym to "people of color" under the facts of the complaint) has any particular meaning for establishing discrimination on the basis of a protected class. The complaint defines "Minority" to include a traditional race subclass (African American or Black) and a traditional national origin subclass (Hispanic or Latino). See *id.* at para. 3. Other than the plaintiffs' autonomy of self-defined labeling and the symbolic power of solidarity between the two protected classes, on the surface, there appears to be little to no additional meaning or legal weight behind use of the term "Minority."

194. No. 08-6308-HO, 2010 WL 143769 (D. Or. Jan. 9, 2010).

195. *Id.* at *1–4.

196. *Id.* at *1–5.

197. Complaint at 14, *Harris*, 2010 WL 143769 (D. Or. Oct. 6, 2008).

198. Complaint at paras. 31, 45, *Harris*, 2010 WL 143769 (D. Or. Oct. 6, 2008); see also Complaint at para. 38, *Arevalo v. Or. Dep't of Transp.*, No. 08-06359-HO (D. Or. Nov. 5, 2008) (alleging employment discrimination on the basis of race, sex, and color in part because "Defendant's actions created a hostile work environment toward women and people of color that Plaintiff was subjected to").

199. 704 F. Supp. 2d 202 (E.D.N.Y. 2010).

200. *Id.* at 219.

ly on the retaliation she suffered for opposing the defendants' discriminatory treatment of a colleague.²⁰¹ The plaintiff asserted that "[t]he Defendant COLLEGE has maintained a pattern and practice of treating people of color . . . differently than [sic] it treated its White and/or American employees, and retaliated against persons who question and oppose the Defendants' repeated refusals to follow the Tripartite Committee's findings as to discrimination."²⁰²

Where there has been little guidance to litigants on the relationship between race and color discrimination or the defining boundaries of color discrimination and its relevant subcategories, it is unsurprising that parties themselves would fill the void by adopting the social and cultural term people of color in asserting violation of their civil rights. The way that a plaintiff pleads his or her case, however, is meaningful. At the very least, it sets the tone for the way that the court will assess the merits of the case.²⁰³ Where the plaintiff self-identifies as a person of color in the body of the complaint, there is some sense that the label is meaningful for the assessment of the legal claim of discrimination. The same is true for plaintiffs who seek relief on a broader class of people of color or base their factual allegations on broad-based discrimination against people of color. Where the term acts primarily as shorthand for discrimination against multiple identifiable groups protected under the relevant statute(s), this Article questions its utility. Further, as the next part sets out, the Article ultimately argues that employment of the term may actually work in opposition to the goals of equality in civil rights.

201. *Id.* at 215.

202. Amended Complaint at para. 43, *Hedge v. State Univ. of N.Y.*, No. CV-06-05856 (E.D.N.Y. Nov. 10, 2006); *see also* Complaint at para. 12, *Alex v. Gen. Elec. Co.*, No. 1:12-CV-01021-GTS-DRH (N.D.N.Y. June 25, 2012) (alleging that "defendant GE . . . have [sic] a long history of discriminating against African Americans and other employees of color"); Complaint at para. 7, *Fenner v. News Corp.*, No. 09 CV 9832 (S.D.N.Y. Nov. 30, 2009) (including factual allegations by two self-identified African American plaintiffs asserting widespread discrimination against "other employees of color" in their civil rights complaint); Plaintiffs' Amended Complaint at para. 20, *Phillips v. Minn. State Univ. Mankato*, No. 09-cv-1659-DSD-FLN (D. Minn. Oct. 7, 2009) (alleging a hostile work environment in violation of Title VII and, in support, identifying a supervisor's response as "indicative of an overall racially discriminatory attitude that was hostile and dismissive she had towards [Plaintiff] and others of color at MSU"); Amended Complaint at para. 24, *Kanhoye v. Altana Inc.*, No. 2:05-CV-04308-LDW-WDW (E.D.N.Y. Feb. 10, 2006) (asserting individual claims of discrimination on the bases of national origin, race, and color alleged that "[t]here existed at Altanta a 'glass ceiling' for people of color. . . . and when people of color . . . applied to work in . . . [the Validation] Department or expressed interest in working [in the Validation] Department, they were passed up for White, American-born individuals from outside the company"); Complaint for Declaratory, Injunctive, and Monetary Relief at paras. 27, 49, *Thompson v. Southwest Airlines Co.*, No. 04-313-JM (D.N.H. Aug. 17, 2004) (alleging discrimination on the basis of race and color in violation of Title VI and, in support, asserting that she "observed that [a Southwest employee] stopped to speak to another person of color requesting to see her ticket" and "[o]n information and belief a disproportionate number of women and persons of color are subjects of Southwest's policy requiring a passenger to purchase a second ticket"); Complaint for Declaratory Relief, Injunctive Relief, and Damages at paras. 2, 4, *Hublely v. CIC Corp.*, No. 3:02-cv-05566-FDB (W.D. Wash. Oct. 31, 2002) (asserting "a pattern and practice of discrimination against people of color and families with children, and retaliation against those who have opposed discriminatory practices" and alleging discriminatory treatment on the basis of race and familial status).

203. *See supra* Section II.C.

IV. THE CLASH OF “PEOPLE OF COLOR” AND “COLOR”

The flexibility of the term people of color, arguably so useful in social and political coalition building,²⁰⁴ is exactly what may limit its usefulness in addressing entrenched bias through civil rights challenges. This Article has traced the history of the terms colored and color in the debates preceding the passage of the Civil Rights Act of 1964, the advent of colorism claims under that very law, and the movement toward alleging people of color discrimination as a civil rights claim. The parts, taken together, establish that the institutional actors’ declination to identify the boundaries of the color protection and its subclasses has created an opening for self-definition. Flowing from that void, there has been a recent trend of employing the phrase people of color in defining a subclass of color or race in civil rights challenges. The problem is that the term people of color has no bounds. It is flexible and changing; its meaning is dependent on time, place, and speaker. Therefore, it has little utility in the legal framework of the Civil Rights Act and related anti-discrimination laws. In fact, in certain cases, it not only adds little to the claim but may work at cross-purposes to the goal of addressing discrimination through the current legal structure.

A. *White is a Color*

Set alongside the development of the shifting racial lexicon in the United States, it would seem that the prohibition against color discrimination would prohibit discrimination against people of color, defined as non-White minorities. But what if White is a color under the law? There is a strong argument under the law that White is, indeed, a color. If that is the case, the term people of color ceases to be a subclass of color; the subclass swallows the whole protected class category.

The legislative history and jurisprudence of Section 1981 of the Civil Rights Act of 1866 suggest that White people are protected under that statute. Section 1981 guarantees the same rights to all persons “to make and enforce contracts, to sue, be parties, and give evidence . . . and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.”²⁰⁵ The statute was passed in 1866, in the wake of the Civil War. Its primary purpose was to protect the civil rights of African Americans, many of whom had recently been emancipated from slavery. The legislative history of Section 1981, however, indicates that the statute’s proponents had an expansive concept of the class of people the legislation should protect. For example, Senator Trumbull described the bill as applying to “every race and color,” and Senator Howard noted that the object of the bill was to give “to persons who are of different races or colors the same civil

204. Vidal-Ortiz, *supra* note 138, at 1037–39.

205. Civil Rights Act of 1866, 42 U.S.C. § 1981.

rights.”²⁰⁶ The legislative history of the Civil Rights Act of 1964 similarly establishes that Congress intended the legislation to protect against discrimination against Whites. Representative Celler noted, about the legislation, for example, that “there could be discrimination against White people and there could be against colored people.”²⁰⁷

The courts have adopted the same rationale in civil rights jurisprudence. In the 1976 decision in *McDonald v. Santa Fe Trail Transportation Company*,²⁰⁸ the Supreme Court held that the protections afforded by both Section 1981 and Title VII applied to Whites, as well as non-Whites.²⁰⁹ The opinion cites Section 1981 legislative history establishing that “the bill was routinely viewed, by its opponents and supporters alike, as applying to the civil rights of whites as well as nonwhites.”²¹⁰ The *McDonald* Court, relying on the plain language of the statute and guidance from the EEOC, also determined that Title VII protections extended to Whites as well as non-Whites. The Court cited legislative history from the Civil Rights Act of 1964 recording congressional intent that Title VII was “intended to ‘cover white men and white women and all Americans,’ and create an ‘obligation not to discriminate against whites.’”²¹¹

Circuit court and Supreme Court decisions in *Al-Khazraji v. Saint Francis College* come to the same conclusion. In *Al-Khazraji*, a professor alleged discrimination by his employer college, claiming violations of Title VII and Section 1981 because he was denied tenure due to his Arab origin and Muslim religion.²¹² After dismissing plaintiff’s Title VII claims on statute of limitations grounds, the Third Circuit rejected the defendant’s argument that Section 1981 did not apply to Arabs, who are “taxonomically Caucasians” and therefore “white citizens.”²¹³ Rather, the Third Circuit, relying on concepts of ethnicity and physiognomy, found

206. CONG. GLOBE, 39th Cong., 1st Sess. 211, 504 (1866). It is not clear whether the legislators’ statements acknowledge a distinction between race and color. It is clear, however, that they acknowledge a preference for the protections embedded in the legislation to be read broadly.

207. 110 CONG. REC. 2579 (1964).

208. 427 U.S. 273 (1976).

209. *Id.* at 295–96.

210. *Id.* at 289; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 211, 504 (1866) (remarks of Sen. Howard, a supporter: “[The bill] simply gives to persons who are of different races or colors the same civil rights”); *id.* at 505 (remarks of Sen. Johnson, an opponent: “[T]he white as well as the black is included in this first section”); *id.* at 601 (remarks of Sen. Hendricks, an opponent: “[The bill] provides, in the first place, that the civil rights of all men, without regard to color, shall be equal”).

211. *McDonald*, 427 U.S. at 280 (first quoting 110 CONG. REC. 2578 (1964) (remarks of Rep. Celler); then quoting 110 CONG. REC. 2578 (1964) (remarks of Sen. Clark)). This is one place where the response of the bill’s proponents to their opponents’ challenges ostensibly resulted in the adoption of the opponents’ agenda. Seemingly, in an effort to gain support for the bill’s passage, proponents of the 1964 civil rights legislation answered challenges from opponents that the legislation was designed exclusively for the benefit of Blacks. In doing so, they promised the bill’s opponents that the legislation was protection for all, explicitly including Whites. *See id.*; *see also* 110 CONG. REC. 2487 (1964) (remarks of Rep. Celler).

212. *Al-Khazraji v. Saint Francis Coll.*, 784 F.2d 505, 506 (3rd Cir. 1986).

213. *Id.* at 514–17.

that the protections of Section 1981 “extend[] beyond those who are taxonomically members of the Negro race.”²¹⁴ The majority concluded:

Congress did not intend to limit Section 1981 solely to those who could demonstrate that they had been discriminated against because they belonged to a particular group identified and described by anthropologists. When Congress referred in the statute to “race,” it plainly did not intend thereby to refer courts to any particular scientific conception of the term.²¹⁵

The Supreme Court affirmed and, after reviewing various definitions of the term race and the legislative history of Section 1981, found that Congress intended to protect against discrimination based on “ancestry or ethnic characteristics.”²¹⁶

If White is a color under the law, then what does it mean to use the term people of color in alleging discrimination? Especially when recognizing the confused jurisprudence on color discrimination, under such an analysis, an allegation of discrimination against people of color would have no meaning whatsoever. If all people have a color under the law, then people of color is synonymous with people and the potential of the protected class falls away completely.

B. Problems of Proof

Even if people of color is not read to include Whites, its use in civil rights claims creates problems of proof. *United States v. Fountain View Apartments* provides a cautionary tale for pleading discrimination on the basis of membership in the people of color category.²¹⁷ Defense counsel attempted to redefine the government’s color subclass to avoid liability. In doing so, defense counsel not only challenged the plaintiff’s right of self-definition but also used the flexibility of the term people of color to seek to introduce arguably irrelevant exculpatory evidence. She specifi-

214. *Id.* at 514–15. The *Al-Khazraji* court implicitly recognized the difficulties in separating the concepts of race and color, noting, “We believe that Congress’s purpose was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically and physiognomically distinctive.” *Id.* at 517. The Third Circuit court continued: “Discrimination based on race seems, at a minimum, to involve discrimination directed against an individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*.” *Id.*

215. *Id.* at 516.

216. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610–13 (1987); *see also* *Jordan v. Whelan Sec. of Ill., Inc.*, 30 F. Supp. 3d 746, 752 (N.D. Ill. 2014). The *McDonald* and *Al-Khazraji* courts addressed the claims under theories of race discrimination. The analysis, however, translates to an assessment of whether White is a color for purposes of assessing color discrimination. *McDonald*, 427 U.S. at 289; *Al-Khazraji*, 784 F.2d at 519. In fact, the *Jordan* court cited *Al-Khazraji* for the same proposition in assessment of a color discrimination claim. *Jordan*, 30 F. Supp. 3d at 752–53.

217. The complaint in *Fountain View Apartments* did not use the term people of color. However, by pleading “race or color discrimination” as a single cause of action, the court applied the term to the singular cause of action. *See supra* Section II.C. Therefore, the lessons of *Fountain View Apartments* apply both to litigants pleading “race or color discrimination,” which is a common way to plead discrimination, and those who evoke “people of color” membership.

cally argued that the Fair Housing Act statute does not define color and that persons of color should be read to include Hispanics as well as “Pakistanis and Indians and southern Italians for that matter.”²¹⁸ If people of color is defined that broadly, it will be exceedingly difficult to prove exclusion of all members of that class.²¹⁹ And because the term people of color is mutable and has changed over time and place, the court or factfinder’s definition of people of color may not comport with plaintiff’s definition. Under a people of color theory, defendants may be allowed to exploit the flexibility of the category to confuse and prejudice the jury.

Another potential barrier is the legal test that applies to an allegation of discrimination on the basis of membership in a subclass identified as people of color. Courts have primarily assessed Title VII employment discrimination claims under the test established in *McDonnell Douglas v. Green*.²²⁰ If the protected class is people of color, the plaintiff will struggle to establish that she was replaced by someone outside of her protected class.²²¹ In other words, she will not only have to establish her membership in the people of color subclass of color but she will also have to establish that she was replaced by someone outside of that subclass. Because of the undefined boundaries of people of color, that may prove to be remarkably difficult. It would be impossible, in fact, if courts were to consider Whites as members of the people of color classification.

Finally, if membership in a people of color group imparts legal rights under civil rights laws, then someone or some entity must define inclusion. In other words, someone must determine whether plaintiff rightfully falls within the boundaries of the identified protected subclass. The law does not define who is responsible for that assessment or set the burden of proof.²²² And, as Taunya Lovell Banks argues, there are barri-

218. Transcript of Final Pretrial Conference at 48, *United States v. Fountain View Apartments, Inc.* (*Fountain View*), No. 6:08-CV-891-ORL-22-DAB (M.D. Fla. Jan. 14, 2010), ECF No. 115. The *Fountain View* court did not ultimately rule on the government’s motion in limine to exclude testimony of Hispanic tenants. Although she did not rule, at the pretrial conference, the judge indicated her willingness to consider defense counsel’s definition of the relevant subclass of the government’s color claim. *See id.* (requesting that “somebody needs to bring me some legal authority that tells me whether people who are Hispanic and brown or native American and red and Asian and yellow are not encompassed as a person of color”). After the court granted summary judgment for the United States on its familial status pattern or practice claim, the case settled. *See United States of America v. Fountain View Apartments, Inc. et al Docket*, PLAINSITE, <http://www.plainsite.org/dockets/tjsns2e/florida-middle-district-court/united-states-of-america-v-fountain-view-apartments-inc-et-al/> (last visited Dec. 22, 2015).

219. The law, of course, does not require wholesale exclusion of a protected class in order to prevail. *See, e.g.*, Fair Housing Act § 804, 42 U.S.C. § 3604 (2012) (provision of Fair Housing Act setting forth criteria of discriminatory action); *see also* *Children’s Alliance v. City of Bellevue*, 950 F. Supp. 1491, 1496 n.8 (W.D. Wash. 1997). The problems of persuasion and confusion of the factfinder, however, persist.

220. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *see also* *Moore v. Dolgencorp, Inc.*, No. 1:05-CV-00107, 2006 WL 2701058, at *1–2 (W.D. Mich. Sept. 19, 2006).

221. *See, e.g.*, *Moore*, 2006 WL 2701058, at *4; *see also supra* Section II.B.

222. In *Barrella v. Village of Freeport*, 43 F. Supp. 3d 136, 177–78 (E.D.N.Y. 2014), the Court found that the determination of the race of the person promoted in plaintiff’s stead was a question best left to the jury after having heard testimony about the witness’s own self-identification, testimo-

ers to colorism claims and concerns with both self-identification and external assignment of skin tone.²²³ Self-identification will invariably create confusion for the fact finder and engender distrust from those fighting the expansion of civil rights protections. External assignments, by judge or jury, will raise discomfort for the fact finder identified in *Sere* and *Moore*, remove the plaintiff's autonomy to self-designate, and run the risk of limiting the protection of the laws.

Herbst issues a broader challenge to the use of racial labels that further complicates the insertion of culturally relevant racial labels into civil rights jurisprudence. He argues that the language of group self-definition is problematic because it forces individuals to choose to be inside or outside of the group. He notes:

[A] group will not necessarily agree on what it wishes to be named, if it wishes to be named—or even grouped—at all. Nor do many individuals (consider, for example, persons of multiracial background) identify with any particular ethnic group, or any single group. Nor does use of a self-descriptive term always mean true identification with a group; it could simply be a rhetorical choice. Ethnic naming is often a dicey business.²²⁴

Where a plaintiff asserts discrimination on behalf of an unnamed and undefined group of people of color, itself a vague categorical concept, she runs the risk of essentializing a group of varied individuals who may not wish to be so categorized.

C. Measuring Progress

Adapting the language of a social movement focused on solidarity and coalition building into civil rights legal challenges also jeopardizes the collection of critical data regarding discrimination. Because insertion of the people of color category into the legal framework raises the substantive and evidentiary hurdles identified above and further entangles the categories of race and color, its usage in that capacity is likely to artificially suppress data about discrimination.

In the 2000 Census, respondents were, for the first time, given the option to self-identify as more than one race.²²⁵ The results were nomi-

ny from others on their perception of the witness's race, and the jury's own assessment of the witness's race.

223. See Banks, *Multilayered*, *supra* note 56, at 218.

224. HERBST, *supra* note 112, at xii–xiii.

225. See Karen R. Humes, Nicholas A. Jones & Roberto R. Ramirez, *Overview of Race and Hispanic Origin: 2010*, U.S. CENSUS BUREAU 2 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>. There are five racial categories: White, Black or African American, American Indian or Alaska Native, Asian, and Native Hawaiian or Other Pacific Islander plus Some Other Race. *Id.* Individuals may also self-identify as Hispanic or Latino, but such identification is a National Origin identification that is separate and distinct from the questions on race for purposes of the Census. *Id.*

nal; only 2.3% of the population so identified.²²⁶ But the fight prior to the introduction of the 2000 Census questionnaire was disproportionate to the ultimate results.²²⁷ On one side, certain advocacy groups argued for the right of self-definition and personal expression.²²⁸ On the other side, civil rights advocates warned that allowing such self-categorization would dilute critical data the government relies on to fund and support civil rights advocacy.²²⁹ Christine Hickman cites to the congressional testimony from a representative of one of the groups challenging the changes to the Census:

Our society's ability to discourage . . . discrimination is based in part on the effective implementation of our civil rights laws. In this respect, the collection of race and ethnic data in the census is fundamental. Any changes to the data collection of race and ethnicity must be strictly scrutinized to ensure that the integrity of our civil rights laws are [sic] not compromised.²³⁰

Introducing people of color into the civil rights structure, with all of the problems of proof identified above, may threaten the collection of accurate data regarding discrimination faced by particular racial and ethnic groups in much the same way.

Similar concerns identified by the civil rights advocates hold true in assessing the effect of people of color claims in race discrimination or color discrimination causes of action. In 2013, the EEOC reported 3,144 claims of alleged color discrimination, up from 2,662 reported in 2012.²³¹ The government and advocates collect data on claims, settlements, and legal outcomes for various civil rights claims. Such data collection is critical in assessing trends in discrimination allegations and charges. Because of the inherent fluidity of the people of color definition and the problems of proof in asserting people of color discrimination, invoking people of color in discrimination lawsuits risks underestimating both race discrimination and color discrimination. Just as the incorporation of multi-racial and multi-ethnic choices on the U.S. Census may diminish the usefulness of the data to advance civil rights support and funding, the inclusion of the people of color construct in discrimination claims may

226. *Id.* at 6.

227. Hickman, *supra* note 94, at 1254.

228. *Id.* at 1254–55.

229. *Id.* at 1254. For further discussion on the debate preceding the 2000 Census, see *id.* at 1254–64.

230. *Id.* at 1254 (alteration in original) (quoting Hearings Before the Subcomm. on the Census, Statistics, and Postal Personnel of the Comm. on the Post Office and Civil Service, 103d Cong. 182 (1993) (statement of Steven Carbo, Mexican American Legal Defense and Educational Fund)).

231. See EEOC CHARGE RECEIPTS BY STATE (INCLUDES U.S. TERRITORIES) AND BASIS FOR 2013, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www1.eeoc.gov/eeoc/statistics/enforcement/state_13.cfm?renderforprint=1; EEOC CHARGE RECEIPTS BY STATE (INCLUDES U.S. TERRITORIES) AND BASIS FOR 2012, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www1.eeoc.gov/eeoc/statistics/enforcement/state_12.cfm?renderforprint=1.

skew data relied upon to measure the success of, and continued need for, our civil rights legal tools.

D. A Brief Cost-Benefit Analysis

There is a cost to denying a plaintiff's desire to adapt the cultural concept of person of color into civil rights litigation. It denies a person who identifies as part of a group from asserting that identity in a particular legal context. As Katherine Kruse explains, "Critical lawyering theorists argue that attempting to force clients into existing legal doctrinal categories may ignore the reality of their lives and reinforce and reproduce patterns of oppression that subordinate them."²³² It is, therefore, a complicated analysis to determine the cost of limiting a plaintiff's agency in defining her identity in a civil rights challenge. One must weigh the costs of loss of agency against the potential risks, some of which are identified herein, associated with trying to adapt a cultural concept into a legal argument.²³³

This Article recognizes that, as Anthony Amsterdam and Jerome Bruner so convincingly tell us in *Minding the Law*, narrative storytelling is both the way we argue and understand the law, and that story is inextricably linked to and influenced by our cultural experience.²³⁴ Amsterdam and Bruner acknowledge that, as part of culture, we continually reinterpret the past in response to new requirements.²³⁵ This Article does explore a kind of reinterpretation of the past. It notes that the civil rights legal structure is built on assumptions about the interchangeability of race and color and a binary Black/White assessment of race. It challenges lawyers and advocates to think about how protection against color discrimination can stand as distinct from race discrimination to enhance the protections of the current structure. And yet it cautions that the risks inherent in adapting the concept of people of color into civil rights challenges may ultimately outweigh the benefits under the current legal doc-

232. Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 395 (2006) (citing Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 48 (1990)).

233. It may be that engaged client-centered counseling is the appropriate way to assess those risks and benefits for each particular client. See STEPHEN ELLMANN ET AL., *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* 72–98 (2009); Katherine R. Kruse, *Engaged Client-Centered Representation and the Moral Foundations of the Lawyer-Client Relationship*, 39 HOFSTRA L. REV. 577, 587 (2011) ("Engaged client-centered representation recognizes that clients do not arrive with static and pre-determined objectives to which lawyers can simply defer. Clients' objectives are tied to their feelings, relationships and experiences; their objectives often change over the course of representation; and their objectives are shaped in part by the information about the law and available legal options that their lawyers explain to them."). Regardless, it is worth engaging in the conversation about how making such a choice impacts patterns of subordination more broadly, a topic that is beyond the scope of this Article. This Article starts from the premise that, while perhaps flawed, the current civil rights structure offers some opportunity to challenge bias and discrimination in particular settings like employment. For further discussion about the utility of the civil rights model as a force of social change and racial equality, see sources cited *supra* note 15.

234. See generally ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000).

235. *Id.* at 222.

trine. Despite the recognized value of the people of color concept in cultural and political spheres, this Article finds that there is limited space in the current civil rights legal structure for reimagining identity.

CONCLUSION

The Civil Rights Act of 1964 protects against discrimination on the basis of particular, generally immutable, characteristics. One such characteristic is color. Yet, neither the statute nor the legislative history provides guidance on the meaning of color, its relationship to race, or the bounds of any particular subcategories necessary to establish differential treatment. And the courts have failed to offer sufficient clarity. Therefore, it is not surprising that parties are seeking to define color, its relationship to race, and its subcategories in legal claims. One such effort is the recent inclusion of people of color as a proposed subclass of color or race when identifying plaintiff's protected class. Introduction of the term people of color into the civil rights jurisprudence, however, carries the risk of constricting protections that remain critical to the advancement of racial equality today.²³⁶

There is political and cultural coalitional power of bringing a greater number of people under one interest group. In fact, the political power of those who identified as Black in the 1960s was a strong motivator for the passage of the Civil Rights Act of 1964.²³⁷ Although people of color have historically lacked political power, there is arguably more control and sway with larger and united numbers.²³⁸ So it seems counterintuitive that utilizing the language of inclusion (i.e., people of color) in civil rights jurisprudence would be counter to the goal of racial equality. And yet that is exactly what this Article suggests.²³⁹ The definitional void in

236. I recognize that eliminating the use of the terms person of color and people of color as means to challenge discrimination against all non-White persons under the Civil Rights Act of 1964 and the Fair Housing Act may leave a gap in protection. At the very least, it may dampen the efficient use of such complaints to redress discrimination against a wide swath of people, especially in class action litigation or a complaint akin to the complaint in *Darensburg*. See *supra* Section III.C. Strategies to address the fallout, such as pleading race discrimination and color discrimination as separate and distinct causes of action, are beyond the scope of this Article.

237. See Edward J. Erler, *Equal Protection and Personal Rights: The Regime of the "Discrete and Insular Minority,"* 16 GA. L. REV. 407, 443 (1982) ("The Civil Rights Act of 1964 and the Voting Rights Act of 1965, whatever altruism they may have displayed as remedies for 'historic' discrimination, were a large part of the attempt to keep the urban black vote solidly Democratic."); William N. Eskridge, Jr., *Is Political Powerlessness A Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L.J. 1, 11 (2010) (noting that racial minorities had persuaded Congress to adopt the Civil Rights Act of 1964 and the Voting Rights Act of 1965). *But cf.* Crenshaw, *supra* note 15, at 1383 (noting that a consequence of the civil rights reforms of the 1960s "may be the loss of collectivity among Blacks" as Blacks moved into different spheres in American society).

238. See Ramirez & Rumminger, *supra* note 154, at 500 & n.77 (noting that "people of color" have a significant population and therefore have the potential to "wield their own political power," but recognizing that it would require creation of a single coalition).

239. This is certainly not the first time that a seemingly progressive topic has been criticized for its failure to provide sufficient specificity to provide meaning. See, e.g., Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R. & C.L. 171, 176-77 (2005) (criticizing the

civil rights jurisprudence left by the institutional actors should not be filled by insertion of the people of color concept. Because of the history of conflating the terms color and colored, joined with the difficulty in disentangling color from race, the existing legal structure for establishing civil rights claims leaves little room for reimagining identity. Inserting people of color into civil rights challenges will expose the claims to significant substantive and evidentiary challenges. Doing so will weaken the breadth of the law's protection against discrimination by stripping the potential of color discrimination claims and compromising claims of race discrimination.

diversity rationale as a means to effect anti-subordination goals because the term's vagueness limits its utility).